THE RULES AND PRACTICE

OF THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMPRISING

THE ORDERS OF 1850 AND 1851,

WITH

Explanatory Notes referring to the English Orders and Decisions;

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INTRODUCTORY REMARKS.

It will be readily observed by those members of the Profession, whose daily and nearly sole practice is in the Court of Chancery, that this Manual will afford them little more than a more convenient mode of reference to materials with which they are already familiar. But even to these practitioners this ready means of reference may be found of some service.

To other members of the Profession,—to the country practitioners, and to those who have not hitherto been much in this Court—the arrangement of the Rules of the Court in a compendious shape, as is here attempted, would seem necessary for the purpose of enabling them, without much discouraging inconvenience and trouble, to conduct Causes in Equity. The Rules, or Orders, by which the Practice was governed, were to be searched for among the English orders passed prior to March, 1837, the date of our first Chancery Act—among the several Orders of this Court issued prior to the Act of 1849, excepting out of them such as are abrogated by the Orders of 1850; and with them were to be incorporated the Orders of 1849, 1850, and 1851. It was thought, that to arrange these with reference to their subject matter would be useful to the practitioner and the student; and especially to those who, practising out of Toronto, had not hitherto been enabled to attend personally to the conduct of Equity Causes, but to whom the practice is now opened by the Orders of 1851, which are published at the close of this volume. With respect to these last mentioned Orders, it was the intention to incorporate them with the others according to their subject matter; but, as they have not been promulgated so early as was expected, and the writer having

been strongly advised not to delay the publication of the work, all that part containing the former Orders was at once sent to the press, thereby rendering it necessary to print the new Rules by themselves at the end; but short notes have been appended, showing their connection with, or effect upon, the provisions of the former Orders.

A circumstance, which might possibly be supposed to render a work of this kind not altogether necessary, is, that there is an opinion in some quarters to this effect, that the Court of Chancery, as now established in Upper Canada, is not likely to remain a permanent institution—that, like many other creatures of Canadian Parliamentary birth, it may soon suffer annihilation at the hands of the parent, and that indeed such an event would be rather popular than otherwise. On this subject it would be presumption to offer an opinion here. The benefit, or otherwise, of this particular Court is a question of public economy, and not of law. Those whose duty it is to consider and decide upon such questions, will no doubt give it sufficient consideration. But one conclusion is inevitable, whether this or that Court be suffered to remain or be abolished, some tribunal, having power to try causes, such as those now brought before the Court of Chancery, must exist. There must be a Court, in which claimants can have redress in cases which the present common law tribunals cannot reach. Such cases will arise, and by some Court they must be decided. This is sufficient for our purpose; and it is therefore unnecessary to enter into an argument as to which kind of Court would be most popular for the purpose, or which system would be most efficient. If, whatever changes in the jurisdictions take place, there must still be Equity administered by some Court, (and this seems undeniable) then it must be useful for the Profession to have kept clearly before them, from time to time, as alterations take place, the Rules by which the practice in the administration of Equity is governed.

When further important alterations happen to be made in the practice, the writer hopes that he, unless some one more fitted for it shall undertake the task, will keep the Profession supplied with the necessary supplementary publications.

It may not be out of place,—but chiefly with a view to those readers whose business may not have led them to pay much attention to Equity,—to refer to a few of those cases, in which the proper relief cannot be had at law, and the intervention of *some* tribunal, empowered to administer Equity, becomes necessary.

A party has purchased a lot of land. He pays a portion of the purchase money, but is in arrear as to the remainder. The vendor brings an action of Ejectment and turns the purchaser out of possession. The purchaser afterwards tenders his purchase money, but the vendor refuses it, saying that the payment was not made in time, and he will not now take it. He prefers keeping the part of the purchase money which has been paid, and taking also the benefit of the improvements which the purchaser may have made. The Ejectment clearly could not have been defended. Such a purchaser can in Equity, unless there are special circumstances against him, have a specific performance of his contract, and a conveyance of the Estate on making payment. A recent case on this subject is MACDONALD *vs.* ELDER.—*Grant's Chancery Reports*, Vol. 1.

The ordinary mortgage transactions, which are constantly occurring, cannot be adjudicated upon completely by the Common Law Courts. The right of the mortgager to redeem is no unreasonable indulgence, limited, as it now is, to six months instead of twelve as formerly, after the account is taken. The Court of Chancery is the only Court by proceedings in which, this right can be foreclosed, or extinguished.

There are many cases where the right to redeem, does not rest on the express words of a mortgage in the usual form, but upon special circumstances and extrinsic evidence, which in some cases have been deemed sufficient to sustain the right to redeem, although such a permission might seem contrary to the words of the deed. Where, for instance, there has been fraud, accident, or mistake, and the holding of the deed to be an absolute conveyance would be inconsistent with the dealings between the parties. In such cases the Rules of Common Law prevent any relief being granted in those Courts, and resort is necessary to an Equitable jurisdiction. A case of this kind is

LETARGE *vs.* DE TUYLL,—*Grant's Chancery Reports*, Vol. 1, p. 227; and the distinction is very clearly drawn in the judgment of the Court of Appeal in the case of STEWART *vs.* HOWLAND between the cases in which relief can, and where it cannot, be given in opposition to the words of the conveyance---in short, where the Statute of Frauds must prevail, and where it can be held inapplicable, because to use it as a shield would be to make it the means of effectuating fraud. The case of STEWART *vs.* HOWLAND was decided in December 1850, and will be found in *Grant's Reports.*

The Jurisdiction of the Court of Chancery is frequently invoked in cases of fraud, where an advantage has been gained by one party over another, who may have his advantage strengthened by having the *Law on his side.* This is the case often enough, where a person has, in ignorance of his actual rights, and not being in a position clearly to understand the effects of his act, executed papers which must have their full effect at Law, but which may be considered in Equity with reference to the real merits of the transaction arising out of all the circumstances. On this subject, though the case goes to other points, the reader is referred to STUART *vs.* HORTON,—*Grant's Chancery Reports.*

The Jurisdiction of Equity embraces the whole numerous class of partnership cases, and those wherein the relations of trustee and *cestui-que-trust* are in question.

A partnership has to be dissolved, and the affairs wound up, and in the meantime one partner desires to be protected against the fraudulent collection and expenditure of the partnership funds. A decree is made, under which the Master has to take the accounts. An injunction is granted, which prevents any improper interference with the assets; and the business is directed to be managed by a "Receiver," who, as the Agent of the Court, collects the assets, and the Court disposes of them in favour of those whom the event of the suit may show to be properly entitled. Such is the case of PRENTISS *vs.* BRENNAN,—*Grant's Chancery Reports*, Vol.1, p. 371.

An Agent or Trustee, possessing advantages with respect to

property which he may hold in such capacity, deals with it in a manner to serve his own ends, and contrary to the real interests of those for whom he acts. The interference of the Court is invoked in manner similar to that above stated. ARTHURTON *vs.* DALLEY,—*Grant's Chancery Reports*; and to these may be added, the large class of cases of administration of Testators and Intestates effects, and the management of the Estates of Infants and Lunatics.

These are a few, and very far from the whole, of the classes of cases, in which an Equitable jurisdiction under the system of laws which obtains in England and here is absolutely necessary. In whatever Court that jurisdiction may be vested, is a matter of comparatively little importance to the lawyer or to the student, or even to the public, provided that it be a Court competent for the purpose, and such as to satisfy the wants, but not to form a disproportionate drag upon the resources of the country. The Equity must be somewhere administered, and it must therefore be studied and practised. Nor will it continue to be studied and practised by a few only of the Profession. The more summary mode of proceeding, and the great reduction of costs in all the Courts, will render it almost out of the question for any one class of men to confine themselves to one branch of the Profession, however desirable that might, under some circumstances, be considered with a view to greater efficiency. These considerations, although perhaps stated at too great length, may be given as fair reasons among others for believing, that a publication of this kind may be useful.

The few authorities cited in these Introductory Remarks are selected, as being in a certain sense leading cases, and having been decided since the establishment of the new Courts.

In the ensuing pages it has not been attempted, in such explanatory notes as are given, to state what the precise practice may be under the New Orders, where any reasonable doubt may exist. And for this reason, that the practice is too new, to render it possible, that the construction of the Orders should be as yet settled by Decisions. In course of time, when other publications of this kind become necessary, the practice may be more clear. A year or two may give occasion, for instance, for many important deci-

sions affecting questions upon which there are now many doubts, namely, *What cases may be referred to the Master under the 75th Order? And how far is a defendant concluded by such reference, if made before he could possibly answer the Bill? And to what extent may the motion be resisted on affidavit?* These questions, and many more such, cannot be answered satisfactorily in the present infancy of the practice; and therefore it is hoped that the omission to attempt showing what the practice is, where it is undeniably in doubt, will be readily excused. What few annotations appear, may be useful to some; but the chief object has been, to give all the Orders in the order of the proceedings in a Cause, and to supply a sufficient Index.

CHAPTER I.

The Statutes.

Court established.

The Court of Chancery for Upper Canada, as at present constituted, owes its existence to, and is governed by, the following mentioned Enactments of the Provincial Legislature.

Statute of 1837.

The first Establishment of the Court was by an Act of the Parliament of Upper Canada,—7th Wm. 4, ch. 2, dated the 4th March, 1837.

A Vice Chancellor to be the Judge.

This Act created a Court, to be called "The Court of Chancery for the Province of Upper Canada", of which Court the Governor of the Province was to be Chancellor, but the Judicial powers of the Court, "both Legal and Equitable", were to be exercised by the Vice Chancellor.

Same powers as the Court in England.

Sec. 2, enacts, that the Court shall have Jurisdiction, and "*possess the like powers and authority as by the laws of England are possessed by the Court of Chancery in England*" in respect of the following matters:—

Matters over which the Court has Jurisdiction.

1. "In all cases of Fraud;
2. "In all matters relating to Trusts;
3. "In all matters relating to Executors; and
4. "Administrators;
5. "In all matters relating to Mortgages;
6. "In Dower.
7. "In all matters relating to Infants, Idiots, and Lunatics, and their Estates, except where special provision hath been or may hereafter be made with respect to them or either of them by any law of this Province;

8. "In all matters relating to Awards;
9. "To compel the specific performance of Agreements;
10. "To compel the discovery of concealed Papers or Evidence, or such as may be wrongfully withheld from the party obtaining the benefit of the same;
11. "To prevent multiplicity of Suits and to stay proceedings in a Court of Law prosecuted against Equity and good conscience;
12. "To institute proceedings for the repeal of Letters Patent erroneously or improvidently issued;
13. "To stay Waste;
14. "In all cases of Accident;
15. "In all cases of Account;
16. "In all cases relating to Co-partnership."

Not to supersede the Heir and Devisee Commission.

With a proviso, that nothing in the Act should extend to supersede the authority of the Heir and Devisee Commissioners. The powers of these Commissioners are now defined by the Act of 8 Vic. Ch. 8, dated 10th February, 1845. The claims adjudicated upon by them are those of any party "claiming any lands within Upper Canada, for which no patent hath issued, as being the Heir, Devisee, or Assignee of the original Nominee of the Crown, or as having derived a title or claim to such lands from or through any such Heir, Devisee or Assignee."

Vide 8 Vic. Ch. 8.

Infants.

Under the above Clause (7) with respect to Infants the jurisdiction of the Court is confined to cases which do not fall within the "Act respecting the appointment of Guardians," being the 8th Geo. IV. Ch. 6, dated 17th February, 1827. Revised Statutes, page 465. When the case comes within that Act, the application for the appointment of a Guardian must be to the Probate or Surrogate Court, and not to the Court of Chancery. It would undoubtedly be more convenient, had the Court of Chancery a concurrent jurisdiction. In cases where the Estate of an Infant, whose father is not living, and who has no legal Guardian, is in Chancery, although that Court has full power over the Estate, it does not seem, under

Guardian Act, 8 Geo. 4 Ch. 6.

Guardian, how appointed.

the exception above mentioned, to have power to appoint a Guardian of the person. Such a jurisdiction has been exercised by this Court, it is true, prior to the Act of 12th Vic. Ch. 64; but it was only in Exparte Cases, and an application of the kind would, it is believed, now meet with a refusal; for the Court would feel bound by the expressed exception, however convenient and useful to all parties the exercise of the jurisdiction might be.

Partition of the Estates of Infants under 12, Vic. Ch. 72.

An important jurisdiction is given to the Court in the case of Infants by the Act of 12th Vic. Ch. 72, dated 30th May 1849. The first Section enacts, "That any Infant seized or possessed of, or entitled to any Real Estate *in fee*, for *a term of years*, or *otherwise howsoever*, in Upper Canada, may by his or her *next friend*, or by his or her *Guardian*, apply to the Court of Chancery in and for Upper Canada for the sale or *other disposition* of such property, or a competent part thereof, in manner and for any of the purposes hereinafter directed." The "purposes" are, the support, maintenance and education of the Infant; and the Court must be satisfied that the advantage of the Infant is consulted. If over seven years of age, the Infant must be a consenting party. The disposition of the proceeds is controlled by the Court and see 2 W. 4, ch. 35, sec. 9, as to partition of Infant's Estates.

Lunacy Cases.

The practice in Lunacy Cases is regulated by 9th Vic. Ch. 10, dated May 18th, 1846.

Repeal of Patents.

The jurisdiction in respect to the Repeal of Letters Patent is extended by the 29th Section of 4 and 5 Victoria, (1842), Chap. 100, which enacts "That it shall and may be lawful for the Court of Chancery in that part of this Province formerly called Upper Canada, and for the Court of King's Bench in that part of this Province formerly called Lower Canada, upon Action, Bill or Plaint, to be exhibited in either of the said Courts, respecting grants of Land situate in the said Parts of this Province respectively, and upon hearing of the parties interested, or upon default of the said parties, after such notice of proceedings as the said Court shall respectively order, in *all cases* wherein Patents for Lands *have* or

shall have issued *through fraud*, or *in error*, or *mistake*, to decree the same to be void; and upon the Registry of such Decree in the Office of the Provincial Registry of this Province, such Patents shall be deemed void, and of none effect to all intents and purposes whatsoever, and that the practice and proceeding in Court in such cases shall be regulated by orders to be from time to time made and issued by the said Courts respectively."

No orders of Court have been made expressly under this Act, but the proceedings are of course governed by the General Orders.

Court remodelled.

The Constitution of the Court was materially altered by the 12th Vic. Ch. 64, intitled "*An Act for the more effectual Administration of Justice in the Court of Chancery of the late Province of Upper Canada.*"

Under this Act the number of Judges was increased to three, and the offices of Registrar and Master were separated. They had formerly been filled by one person.

How Court constituted.

The Court now consists of the Chancellor and two Vice Chancellors. There are a Master, and Master's Clerk, a Registrar, who is also Registrar of the Court of Appeals, and Registrar's Clerk, and a Reporter. The payment of Officers by fees is abolished by this Act, and the fees are funded, the Officers being paid by Salaries.

Alterations in the practice suggested by 12 Vic. Ch. 64.

The 12th Section of the Act recites the appointment of the Chancery Commissioners, and that "Whereas the "said Commissioners by the Report respectively made on "the *Twentieth day of April in the Eighth year of the* "*Reign of Her Present Majesty, and on the Twenty-* "*fifth day of January then next ensuing*, recommended "certain alterations to be made in the pleadings and prac- "tice of the said Court, and, whereas it is desirable that "the suggestions of the said Commissioners in regard to "shortening the Bill and answer, and enabling the Plain- "tiff to obtain discovery through the medium of a *vivâ* "*voce* examination of the Defendant, and for extending a "like privilege to the Defendant in relation to the *vivâ* "*voce* examination of the Plaintiff, should be adopted;

" And,whereas it is believed that the adoption of the above " suggestion, *the abolition of all unnecessary proceedings*, " and *enabling matters to advance uninterruptedly in " the Master's Office*, will greatly tend to diminish the " costs of proceedings in the said Court, and to promote " the ends of Justice, but it is nevertheless expedient for " the purpose of more conveniently and safely carrying " out these and other alterations, that power should be " vested in the Judges to be appointed under this Act to " make such *rules and orders respecting the pleadings " and practice of the said Court*, for the purpose of " carrying out the aforesaid suggestion, as well as such " others as to them may seem expedient for the purposes " mentioned in the hereinbefore recited Commission, and " for *amending or modifying any of the rules or orders* " which have been or may be made for that purpose, and " for regulating the Offices of the Master and Registrar " of the said Court of Chancery, as well as for *rescinding " the said rules and orders*, or any of them. Be it " therefore enacted, That it shall be lawful for the Judges " to be appointed under the Act for the time being, *to " make such rules and orders as to them may seem ex- " pedient* for regulating the Offices of the Master and " Registrar of the said Court of Chancery, and for carry- " ing into effect the recommendations of the said Commis- " sioners as aforesaid, and from time to time to *make other " rules and orders, amending, altering or rescinding the " same or any of them*, and also *to make all such rules " and orders as to them may seem meet for the purpose " of adapting the proceedings of the said Court of " Chancery to the circumstances of this Province*, as " well in regard to the Process and Pleadings as in the " practice and proceedings of the said Court, and more " especially *the taking, publishing, using and hearing " of testimony in any suit therein pending, or the ex- " amination of all, or any of the parties to any such " suit upon their oaths vivâ voce or otherwise*, including " also the power to *regulate by rules or orders the*

" *allowance and amount of costs.* Provided always, " *that no such rule or order shall have the effect of alter-* " *ing the principles or rules of decision of the said Court,* " *or any of them, or of abridging or affecting the right* " *of any party to such remedy as, before the passing of* " *this Act, might have been obtained in the said Court,* " but may in all respects extend to the manner of obtain- " ing such remedy by regulating the nature and form of " process and pleadings, and the practice of said Court as " regards the method of taking, receiving, publishing, " using, and hearing of testimony, the examination of " witnesses or parties, or any other matter or thing which " may seem expedient for better attaining the ends of " Justice, and advancing the remedies of Suitors in the " said Court."

Under the very ample powers given by this section, the Court has issued the orders of 1850 and 1851, which will be found in their proper order in the following pages.

Country practice.

The conduct of causes in Chancery has been, until recently, necessarily confined to Toronto, where the Court is situated, and the Master's and Registrar's Offices kept. An Act of last Session, 13th and 14th Vic. Ch. 50, dated 10th August, 1850, entitled, " An Act for the more effectual Administration of Justice in the Court of Chancery in Upper Canada," effects an important change in this respect. It empowers the Judges to appoint Masters and Deputy Registrars " in such localities as the said Judges may consider necessary and expedient for the purpose of promoting as far as possible *the local administration of Justice* ;" and to make rules and orders for regulating such offices of Master and Deputy Registrar, and specifying what business may be transacted in them.

The Orders made under this Act will be found near the end of this volume.

Partition.

13 and 14 Vic. Ch. 50, Sec. 4,5,6.

This Statute also provides for the Partition of Estates held in joint tenancy, tenancy in Common or Coparcenery. The same power in this respect is given to the Court as is exercised by the Court of Chancery in England, and as

is given to the Courts of Queen's Bench and the County Courts in Upper Canada.

Change in the law with regard to notice to purchasers, of outstanding encumbrances.

Among the numerous questions arising in a Court of Equity was one of frequent occurrence, as to which the law is materially altered by a recent Act. It was the acknowledged rule in Equity, that a bona fide purchaser of real estate for value, purchasing and paying his money without notice of any previous Conveyance, could defend his title against a prior purchaser. And under the Registry Laws of this Province, as they formerly stood, such a title could be so defended, although the holder of it had not registered his deeds. Nor was the mere fact of registration necessarily notice to a purchaser, unless he searched. But, if he searched the Registry Books, he was bound by notice of their contents. And the same with regard to Judgments. It may here be noticed with regard to this subject of notice, that a purchaser should always make himself acquainted with all circumstances affecting the *possession* of the land. If a third party, and not the vendor, is in possession, the purchaser should enquire of the third party by what title he holds, for he will be bound by his title if he have one. And it was a rule with respect to the plea of "bona fide purchaser for valuable consideration without notice," that it must contain an averment that the vendor was at the time of the purchase in possession. And, although pleas are now abolished, if under the present practice such a defence is set up by answer, this averment should still be made.

13 and 14 Vic. Ch. 63. Registration Notice.

The Act of 1850 alters the law as to all conveyances executed after the 1st of January, 1851. The following sections it has been thought advisable to give in full:—

13 and 14 Vic. Ch. 63. How registered judgments shall affect lands, &c.

2. And be it enacted, That a judgment to be entered up against any person in any Court of Record in Upper Canada *after the first day of January, one thousand eight hundred and fifty-one*, shall operate as a charge, so soon as a certificate of such judgment shall have been duly registered, upon all lands, tenements, and hereditaments situate within the county where such certificate shall have been registered as aforesaid, of or to which such person shall at the time of registering such judg-

ment, or at any time afterwards, be seized, possessed or entitled, for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall at the time of registering such judgment, or at any time afterwards have any disposing power, which he might without the assent of any other person exercise for his own benefit, and shall be binding against the person against whom judgment shall be so entered upon and registered, and against all persons claiming under him after such judgment and registry, and shall also be binding as against the issue of his body, and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion or any other interest, in or out of the said lands, tenements, or hereditaments; and that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act or any other part thereof as he would be entitled to in case the person against whom such judgment shall have been so entered up and registered, had power to charge the said hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgments--debt and interest; and all such judgments shall be claimed and taken to be valid, and effectual according to the priority of registering such certificates. *Provided nevertheless, that nothing therein contained shall be deemed or taken to alter or affect any doctrine of Courts of Equity, whereby protection is given to purchasers for valuable consideration without notice.*

Remedies of judgment creditor.

Proviso as to notice.

All deeds, devises, &c., executed after 1st January, 1851, to be registered.

3. And be it enacted, That after any Grant from the Crown of any lands in Upper Canada, and Deed Patent thereof issued, every deed, devise, or other conveyance which shall be executed at any time after the first day of January, one thousand eight hundred and fifty-one, whereby any lands, tenements or hereditaments in Upper Canada may be in any wise affected in Law or Equity, shall be adjudged fraudulent and void, not only against any subsequent purchaser or mortgagee for valuable consideration, but also against a subsequent judgment creditor, who shall have registered a certificate of his judgment, unless such memorial be registered as by the said first recited Act* is specified before the registering of the memorial of the deed, devise or conveyance, or the certificate of the judgment, under which such subsequent purchaser, mort-

* This is the Registry Act of 1846, 9 Vic. Ch. 34.

gagee or judgement creditor respectively shall claim, subject nevertheless as to devisees, to the provisions contained in the twelfth section thereof. Provided always, that nothing herein contained shall be construed to affect the rights of equitable mortgagees as now recognised in the Court of Chancery in this Province. Proviso.

4. And, whereas the Doctrine of Tacking has been found to be productive of injustice, and requires correction: Be it enacted, That every deed and conveyance executed after the first day of January, one thousand eight hundred and fifty one, a memorial whereof shall be duly registered, and every judgement recovered after the date last aforesaid, a certificate whereof shall be duly registered, shall be deemed and taken as good and effectual both in Law and in Equity according to the priority of the time of registering such memorial or certificate; and, when no memorial of such deed or conveyance shall have been duly registered, then such deeds or conveyances shall be deemed and taken to be valid and effectual, both at Law and in Equity, according to the priority of time of execution. Deeds, &c., to take priority according to the date of registry.

7. And be it enacted, That the Registry, or Registry of any certificate of judgment as *hereinbefore mentioned*, shall be deemed and taken to be a registry of such judgment for the purposes of this Act. Certificate of judgment may be registered.

8. And be it enacted, That the Registry of any deed, conveyance, will or judgment *under the first recited Act*, or this Act, affecting any lands or tenements, shall in Equity constitute notice of such deed, conveyance, will or judgment, to all persons claiming any interest in such lands or tenements subsequent to such registry. Registry to be deemed notice.

9. And be it enacted, That the Register of every County in Upper Canada shall, after the passing of this Act, enter in a separate book to be kept for that purpose the certificates of all judgments brought to him for registration, and prepare an alphabetical index thereto. Separate book for registry of judgments.

As regards judgments which have already been registered under 9 Vic. Ch. 34, they may be rendered of the same effect as if registered under the above Act, by complying with the following provision of the first section, "that whenever any judgment shall have been registered before the passing of this Act, the party in whose favour the same shall have been rendered, may require the Registrar of any County to mark on the margin of such registry, and sign the same "Registered this—— day of ——— A. D. eighteen, ———" Re-entry of registration of judgments already registered.

and such entry of registry shall have the same effect from such dates as if it had been registered under this section." That is, the same effect as docketted judgments in England before the practice of docketting was there discontinued. And it is submitted, that under the above 7th and 8th sections, taken with the first, such formerly registered judgments with the new entry made as above prescribed, will stand in precisely the same position from the date of the new entry, as judgments entered up and registered after the 1st January, 1850; and such would seem to have been the intention of the Act.

Intention and effect of the Act.

Judgment creditors parties to Bills.

All the holders of such registered judgments and conveyances will have the right to redeem as against a prior encumbrancer, and will be proper parties to bills, to redeem and foreclose; and their rights cannot be extinquished without their being so made parties.

Proviso as to bona fide purchasers.

The proviso at the close of the above second section, taken in connection with 8th section, can only affect a small class of cases. The old rules will hold in cases where the question lies between two encumbrancers, neither of whom have registered, and the same would have been the result, had the above proviso been omitted, for the other provisions of the Act do not apply to such cases.

Tacking.

The doctrine of Tacking, which is done away with by the above 4th section, had been, though with some remarks as to its inconvenience, held to apply in this country. It is thus defined by Mr. Justice Story in his Equity Jurisprudence, sec. 412, "Uniting Securities given at different times, so as to prevent any intermediate purchasers from claiming a title to redeem, or otherwise to discharge, one lien, which is prior, without redeeming or discharging the other liens also, which are subsequent to his own title. Thus, if a third mortgagee, without notice of a second mortgagee, should purchase in the first mortgage, by which he would acquire the legal title, the second mortgagee would not be permitted to redeem the first mortgagee without redeeming the first mortgage also; for in such a case Equity tacks both mortgages together in his favor.

And in such a case it will make no difference, that the third mortgagee had notice of the second mortgage; for he is still entitled to the same protection."

In cases arising upon titles acquired prior to the operation of the above Statute, the same doctrine will still apply; but to no other cases. As regards judgments unregistered, they are of course cut out by a registered deed under the above Act, whether or not it be true that a judgment creditor, whose judgment is not registered, has a right to redeem—a question on which there is here some difference of opinion. The better opinion seems to be that a judgment creditor, who has placed his writ against lands in the Sheriff's hands, has a right to redeem a prior mortgage, and should be a party to a bill to foreclose; although it has been otherwise decided by Mr. Vice Chancellor Jameson. But of course under the above Act, such a creditor, neglecting to register his judgment, can be completely shut out by a subsequent encumbrancer who registers.

CHAPTER II.

The Bill.

First proceeding.

The first proceeding in a suit in Chancery is by Bill. This Bill formerly consisted of nine parts,—1. The address.—2. The names of the parties.—3. A statement of the facts.—4. A general charge against the Defendant. —5. Particular charges in answer to what the Defendant pretends to be his case.—6. An averment that the Defendant's conduct was contrary to equity and good conscience.—7. The interrogatories, which the Defendant was bound to answer substantially and literally.—8. The prayer for relief.—And 9. The prayer for process or writ of subpœna, to compel the defendant to appear and answer; and the bill was to be signed by the Counsel. The form is now much shortened, and embraces only the 1st, 2nd, 3rd, 8th and 9th of the above mentioned parts; and neither the bill, nor any other pleading, needs be signed by Counsel. The Bill is now in the shape prescribed by the following order :—

1850. XI. Form of Bill.

The bill shall in future be in the form of a petition, addressed to the Chancellor. The address and conclusion shall be as in Schedule A. to these Orders appended. It must contain—

1. The name and description of each party complainant.
2. A statement of the plaintiff's case in clear and concise language.

3. It must pray the specific relief to which the plaintiff supposes himself to be entitled.
4. Besides the prayer for process the prayer for general relief may be added.

The bill needs not be signed by Counsel, nor shall it contain any interrogatories, and all merely formal parts shall be omitted except only the address and conclusion.

The form is as follows :—

IN CHANCERY.

To the Honorable William Hume Blake, Chancellor of Upper Canada :

The Bill of Complaint of A. B., of &c. (here follow the names and additions of all the parties complainant)

Showeth, that (state the complainant's case as succinctly as can be done consistently with due certainty, and in any language suitable for the purpose)

To the end, therefore, that (state the relief sought) your complainant prays that (if an injunction or other special writ be required, introduce an appropriate prayer) a subpœna may issue under the seal of this Honorable Court, directed to the said C. D. (name all the parties defendant), calling upon him to appear to this bill and observe what this Honorable Court shall direct in that behalf.

And your complainant shall ever pray, &c.

There is no English Order similar to this, the change having been there from the old Bill with Interrogatories and formal parts to the Short Claims under Lord Cottenham's Orders of 1850.

Other modes of commencing a suit.

The other modes of proceeding in Chancery are those prescribed by the Orders of 1851, which are given at the conclusion. This was found more convenient than embracing the Orders in this part of the book. The proceedings here stated apply to all such cases as are not excepted by the more recent Orders, the object of which has been, to simplify the proceedings in all cases which involve no points on which evidence is required to be entered upon prior to the decree. The practitioner then will find it necessary to ascertain whether each case comes under the provisions of the now stated Orders, or those of 1851.

Amendment.

After the Bill is filed, several circumstances may render it advisable to alter or amend it. Some fact may come to the Plaintiff's knowledge, which it may be found necessary to put in issue before the Defendant has answered the Bill; and at that early period the amendment may be made as of course. Or, after the Bill is answered, it may be found advisable to make an amendment with a view to meeting the case set up in defence; and frequently several amendments may become necessary. The terms on which these can be made are provided for by the following Order—

1850.

AMENDMENT OF BILL.

XII.

Amendment of Bill on motion or petition.

An Order for leave to amend the Bill may be obtained at any time before answer, upon motion or petition in the Cause without notice.

Clerical error.

An Order for leave to amend the Bill, only for the purpose of rectifying a clerical error in names, dates, or sums, may be obtained at any time upon motion or petition in the Cause without notice.

One Order of course.

One Order of course for leave to amend the Bill, as the plaintiff may be advised, may be obtained by the plaintiff at any time before filing the replication, and within four weeks after the answer, or the last of several answers shall be filed; but no further Order of course for leave to amend the Bill is to be granted, after an answer has been filed, except in the case provided for by the second section of this Order.

Without prejudice to an injunction.

The plaintiff, having obtained an Order for leave to amend his Bill, has, in all cases in which such Order is not made without prejudice to an injunction, fourteen days after the date of the Order within which he may amend such Bill.

If such Bill be not amended within such fourteen days, the Order for leave to amend becomes void, and the Cause as to dismissal stands in the same situation as if such Order had not been made.

Amend within seven days.

And the plaintiff, having obtained an Order for leave to amend his Bill, without prejudice to an injunction, must amend such Bill within seven days from the date of the Order.

If such Bill be not amended within such seven days, the Order for leave to amend becomes void, and the cause as to dismissal stands in the same situation as if such Order had not been made.

1850. XIII. Amendment in lieu of Supplemental Bill.

Supplemental Bills are hereby abolished. Where a suit is defective by reason of some imperfection in the Bill, and not in consequence of any event occurring subsequent to its institution, the Court may at any time permit an amendment of the Bill in furtherance of justice, and on such terms as may be proper, for the purpose of altering the allegations in the Bill, or of putting new matter in issue, as well as for the purpose of adding or striking out the names of parties, or of varying the relief prayed, or praying further relief.

Order, how applied for.

Such Order shall be applied for by motion, stating the required amendment, of which motion notice must be served upon the parties or their solicitors, unless dispensed with.

The motion must be supported by affidavit satisfying the Court—

1. Of the Truth of the Amendment.
2. Of the propriety of permitting the Amendment at the particular stage of the Cause under all the circumstances.
3. That the Order will promote the ends of justice, unless these requirements may sufficiently appear from evidence before the Court.

Upon pronouncing such Order for amendment, the Court shall give such directions as to the future conduct of the Cause, in relation to answering such amendments, as also respecting the evidence taken, or to be taken, and in all other respects, as the circumstances of the case may require.

1850. XIV. Amendment in lieu of Bills of Revivor, Bills of Revivor and Supplement, and Bills in nature of Supplemental Bills.

Bills of Revivor, Bills of Revivor and Supplement, original Bills in the nature of Bills of Revivor, and original Bills in the nature of Supplemental Bills, are hereby abolished. When a suit becomes defective, or abates by any event subsequent to its institution, and before final decree, it shall be competent to the Court to direct an amendment of the Record, in order that such defect may be remedied, and the suit continued, and the benefit thereof obtained.

The order for such amendment shall be applied for by motion, specifying the nature of the amendment and the applicant's title to the same.

Notice of this motion must be served on the parties to the suit or their solicitors, unless the Court under special circumstances shall dispense therewith; and it may be made by any person who could have heretofore obtained the desired object by Supplemental Bill, or by any form of Bill by this Order abolished.

Motion, how made.

The motion must be supported by such evidence as shall satisfy the Court—

1. Of the Applicant's Title to Relief.
2. Of the propriety of permitting the amendment at the particular stage of the Cause under all the circumstances.
3. That the Order will be a furtherance of Justice.

The Court, upon pronouncing any Order for amendment under this rule, shall give such directions as to the future conduct of the Cause, in relation to answering such amendments, the evidence taken, or to be taken, and in all other respects, as the circumstances of the case may require.

The first two clauses of the above Order XII are in the words of the English Orders LXIV, LXV, of 1845.

English Order LXVI.

The English Order LXVI of 1845 is in the words of the third Clause of the above 12th Order, except that, instead of the words "before filing a replication", it says, "before filing (*or undertaking to file*) a replication."

Compared with English Orders.

The words "last of several answers" in the 66th English Order of 1845, which answers to the 3rd Clause of the above Order 12, have been held to mean, the last answer to be put in before replication, and not the last answer filed before the application to amend. That is, the Plaintiff may wait for all the answers, and then amend within four weeks, unless put upon terms by a motion to dismiss. (See *post* under head of "Speeding the Cause"). *Arnold* vs. *Arnold*, 1 Phillips, 805; *Dalton* vs. *Hayter*, 7 Beaven, 586; *Forman* vs. *Gray*, 9 Beaven, 200). The statement that the Plaintiff may wait for all the answers before amending, may be subject to this exception, that, if a Defendant is stated to be out of the jurisdiction, and all the others have answered, and more than a month has elapsed, an Order of course may be held irregular.—(*King of Spain* vs. *Hullett*, 3 Sim. 338).

It is advisable generally not to take the Order to amend until all the Defendants, who are likely to answer, have answered, for a subsequent answer may suggest a new amendment, and there cannot be a second Order of course to amend. The above 3rd clause of Order 12 says "*one*

Order of course, &c." And see *Davis* vs. *Prout*, 5 Beaven, 375; and, even when the first Order has not been acted upon, a second taken as of course will be irregular, (*Brooks* vs. *Purton*, 4 Beaven, 494).

Re-engrossment.

When a Bill is amended, if any of the amendments extend to more than two folios, the Bill must be re-engrossed and filed, and the Plaintiff pays 20s. to the Defendant, if a further answer is required, but not otherwise.

By an Order of 1843 it is directed:

That where a Bill is amended, and a re-engrossment thereof filed, and a copy of such re-engrossment served on the opposite party under the foregoing Orders, it shall not hereafter be necessary for the Plaintiff to pay such opposite party the usual sum of twenty shillings, unless a further answer be required.

It will be seen, that by the foregoing Orders many descriptions of Bills are abolished, the purposes being attained by simple amendments. All other kinds of Bills, except Original Bills, are abolished by the following Orders:—

XV. Suits how revised.

When a suit becomes abated after decree, any party entitled to revive the same may do so by petition in the cause, which shall state the title of the petitioner to the relief sought. This petition must be verified by affidavit, and be served upon the solicitors of all parties interested, and, in case any such party has no solicitor, upon such party.

Petition.

XVI. Bills of Review abolished.

Rehearing on Petition.

Bills of Review are hereby abolished. When the reversal of a decree is sought upon the ground of error apparent upon the face of the decree, that object may be attained by rehearing the cause, whether the decree have or have not been enrolled. One rehearing may be had upon petition, signed by counsel, as in the case of an ordinary rehearing, as well before as after enrolment, but no petition for a second rehearing shall be filed without leave of the Court first had, upon special motion for that purpose. Provided that this order shall not be construed to authorise the rehearing a cause, in the ordinary acceptation of the term, after enrolment.

XVII. Other Bills abolished.

Reversal of Decree upon Petition.

Bills in the nature of Bills of Review; Bills to impeach decrees on the ground of fraud; Bills to suspend the operation of decrees; Bills to carry decrees into execution; are hereby abolished. Any party heretofore entitled to file a bill of review, praying the variation or rever-

sal of a decree upon the ground of matter occurring subsequently to the decree, or subsequently discovered, or any description of bill by this Order abolished, may in future proceed by petition in the cause, which shall specially pray the relief sought, and state the ground upon which it is claimed. This petition must be verified by affidavit and served upon the solicitors of all parties interested; and in case any such party has no solicitor, then upon such party; and, where the reversal or variation of a decree is sought upon new matter, such proof as would have been requisite upon a motion to file a bill of review must be supplied. Upon the hearing of this petition the Court may, in its discretion, either make a final order, or direct the petition to stand over, with liberty to the parties interested in sustaining the decree to file a special answer to the same; and may make such order as to the production of further proof, and the manner thereof, and the future hearing of the petition, as to the Court may seem meet.

Rescinded Orders as to amendment.

The 1st Order of 1850 rescinds many of the former Orders specifically, and such rescinded Orders are of course omitted.

The 2nd Order of 1850 is as follows:—

All former Orders and parts of Orders not specified in Order 1, so far as the same are now in force *and consistent with these Orders*, are to remain in full force and effect.

Application to amend must now be to the Court on motion, notwithstanding Order 181 of 1846.

The Order 181 of 1846 is not specifically rescinded, and it provides, among other things, that applications "for leave to withdraw replication and amend Bills are to be to the Master, with an appeal, by motion, to the Court. But it will be seen, that this part of the Order of 1846 is not "consistent" with the foregoing Orders of 1850, and is therefore not in force, and all applications for leave to amend must now be to the Court, by motion, on notice.

These Orders, abolishing Supplemental and other Bills, are not after any English Orders, and therefore there is no English practice analogous to that established by them. Such Bills are still in use in England.

CHAPTER III.

The Writ.

The first process against a Defendant is the *subpœna*, obtained on præcipe on filing the Bill, but it cannot be obtained until the Bill is filed. SUBPŒNA.

The 18th Order of 1850 provides that 1850. XVIII.

Subpœnas to appear and answer, and to answer respectively, shall be in the form specified in Schedule B, to these Orders appended, with such memoranda subjoined as therein mentioned.

The form of a subpœna to *appear and answer* is as follows:— Subpœna to original Bill.

IN CHANCERY.

CANADA.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To (*here insert the names of all the defendants in full, as in the Bill*).

GREETING.

We command you, that you cause an appearance to be entered for you in our Court of Chancery of Upper Canada, within (*fourteen days, if the Defendant is within the jurisdiction—in other cases such time as the Court may order*) days after the service of this Writ upon you, exclusive of the day of such service, and that you answer a Bill of Complaint exhibited against you in

our said Court by (*here insert names of Plaintiff in full, as in the Bill,*) and observe what our said Court shall direct in that behalf. Witness the Honorable William Hume Blake , our Chancellor, this day of 185 in year of our reign.

(Name of Registrar.)
Registrar.

(Name of Solicitor.)
Plaintiff's Solicitor.

The following Memorandum to be placed at the foot.

Memorandum at foot of Subpœna.

Appearances are to be entered at the Registrar's office at Osgoode Hall in the City of Toronto; and, if you do not cause your appearance to be entered within the time limited by the above writ, an appearance will be entered for you at your expense; and, if you do not answer or demur to the bill within
you will be subject to such order or decree being made against you as the Court shall think just upon the plaintiff's own showing---(*where the defendant is to be served out of the jurisdiction, add the following words*)---without further notice.

Defendant has only fourteen days to demur alone, notwithstanding the words of the memorandum.

The form of this Memorandum would seem to give rise to reasonable doubt, whether or not the Defendant has the same time to demur alone as to answer, or answer and demur. The 27th New Order, (1850), commences with these words.—"A Defendant is to answer or demur, *not demurring alone*, to any original bill, or bill amended before answer, within one month after appearance," &c. And the 26th New Order gives only fourteen days to demur alone. Whatever may be the apparent meaning of the above form of notice then, a defendant on receiving it is to understand, that, if he elects to demur alone to the Plaintiff's Bill, he must do so within fourteen days after his appearance. It has been suggested, that it would be as well to insert in the memorandum the words "not demurring alone," but this, it has been intimated by the Court, would be a departure from the Order, which prescribes the form, and therefore incorrect.

Mode of service of Subpœna.

Service of the Subpœna is by delivering a copy to the Defendant personally (with some exceptions) and producing and showing the original writ. The affidavit of service must state when and how the service was effected.

The service of the Subpœna is generally, as we have stated, a personal service; but there are cases where leaving the copy at the residence of the Defendant, and the like, is deemed good service. It is recommended, however, that the service be personal in every case when it can be effected; but, were it peremptory in every case, the ends of justice might be defeated by the concealment of a Defendant. There are cases in which service not personal has been held sufficient. *See Earl Chesterfield* vs. *Bond*. 2. Beaven, 263. When service of Subpœna not personal.

Under the 20th Order (see *post* p. 29), it will be seen that the service, in order to enable the Plaintiff to appear for the Defendant, may be at his dwelling house or usual place of abode. Still it is apprehended that there must be some good reason for omitting to make the personal service. (See *Pultney* vs. *Skelton*, 5 Vesey, 147).

Under special circumstances the Court may order service of a Subpœna on the Agent or Solicitor of the Defendant. The following are some of the cases on the subject:—*Smith* vs. *H. M. Co.*, 1 Schoales & Lefroy, 238; *Bromley* vs. *Bank of England*, 7 Jurist, 120; *Hobhouse* vs. *Courtney*, 12 Simons, 140; *Murray* vs. *Vibait*, 1 Phillips, 521; *Cooper* vs. *Wood*, 5 Beaven, 391; *Woodall* vs. *Walker*, 3 Hare, 339; *Hornby* vs. *Holmes*, 4 Hare, 306; *Cope* vs. *Russell*, 11 Jurist, 463; *Hurst* vs. *Hurst*, 12 Jurist, 152; *Waterton* vs. *Croft*, 5 Simons, 502; *Kinder* vs. *Forbes*, 2 Beaven, 503; *Lane* vs. *Hardwicke*, 5 Beaven, 222. Substitutional service.

After amendment of a Bill, it is sufficient, as regards all Defendants to the Original Bill who have appeared to it, that the Subpœna to answer be served on the Solicitor for such Defendants, the 14th Order of June, 1837, remaining, in that respect, in force. That Order is as follows: Service of Subpœna to amended Bills.

XIV. That service on the Solicitor of any Subpœna *to rejoin, or* to answer an amended Bill, or to hear judgment, shall be deemed good service. Order of 1837. Subpœna to amended Bill.

That part of the above Order relating to Subpœnas to rejoin needs not be attended to, for that writ was abolished

by the 157th Order of 1845, and although that Order is among the Orders rescinded by the Orders of 1850, the Subpœna to rejoin is not now necessary, but the cause may be at once set down after replication, and proceeded with by Subpœna to hear Judgment, as hereafter shown.

The above Order (14th of 1837) is in the precise words of the English Order, 26th of May, 1845, under which it has been decided that the Order is not applicable where the Defendant is abroad and his Solicitor only was served; (*Marquis of Hertford* vs. *Suisse*, 13 Sim., 489.) In the case of a Corporation, service on any member is said to be sufficient.

In default of appearance the Defendant cannot be attached as formerly, but the Plaintiff is enabled to appear for him, and proceed with his cause. The following rule abolishes process of contempt for non-appearance.

1850. XIX. All process of contempt for the purpose of compelling appearance is hereby abolished.

Form of subpœna to amended Bill

The form of the subpœna to answer an amended bill differs from the above form, where the Defendant to whom it is directed is already a Defendant to the original bill. As respects such Defendant, the writ is as follows :—

We command you, that within days after the service of this writ upon you, exclusive of the day of such service, you do answer the amended bill of complaint exhibited against you in our Court of Chancery of Upper Canada, by and observe what our said Court shall direct in that behalf. Witness the Honorable William Hume Blake , our Chancellor, day of 185 in year of our reign.

(Name of Registrar.)
Registrar.

(Name of Solicitor.)
Plaintiff's Solicitor.

Memorandum at the foot.

The Bill of complaint filed against you by has been amended by Order bearing date . If you do not answer or demur to the said Bill, or obtain further time for that purpose, within days after the service of this writ upon you, exclusive of the day of such service, the Plaintiff will be at liberty to file his replication.

Where a New Defendant is added, the writ, it would seem, should be in the form first given, putting the word "amended" before the word "bill." For such New Defendant is entitled to his time to appear as well as answer.

CHAPTER IV.

The Appearance.

Orders of 1850. XX. Appearance, and proceedings in default of appearance.

The Subpœna having been duly served, the Defendant must within the limited time enter his appearance, as in the Subpœna directed, or the Plaintiff may appear for him, and in default of answer may proceed to a hearing of the cause, as if the statements in the Bill were admitted, or traversed, in the manner prescribed by the Orders presently following.

The time limited for appearance in ordinary cases is fourteen days, under the following Orders:—(The Italics show where the words differ from those of the English Order 29th).

Order XX.

If any defendant, not appearing to be an infant, or a person of weak or unsound mind, unable of himself to defend the suit, *shall*, when within the jurisdiction of the Court, *be* duly served with a subpœna to appear and answer a bill, and *shall* refuse or neglect to appear thereto within *fourteen* days after such service, the plaintiff may, after the expiration of such *fourteen* days, and within *four* weeks from the time of such service, apply to the *Registrar* to enter an appearance for such defendant; and, no appearance having been entered, the *Registrar* is to enter such appearance accordingly, upon being satisfied by affidavit that the Subpœna was duly served upon such defendant personally, or at his dwelling-house or usual place of abode; and, after the expiration of such *four* weeks, or after the time allowed to such defendant for appearing has expired, in any case in which the *Registrar*

If after four weeks, then an application to the Court.

is not hereby required to enter such appearance, the plaintiff may apply to the Court for leave to enter appearance for such defendant; and the Court, being satisfied that the subpœna was duly served, and that no appearance has been entered for such defendant, may, if it think fit, order the same accordingly.

XXI. Any appearance entered at the instance of the plaintiff for a defendant, who at the time of the entry thereof shall be an infant, or person of weak or unsound mind, unable of himself to defend the suit, shall be irregular and of no validity.

Appointment of Guardian. If upon default, made by a defendant, in not appearing to or not answering a bill, it appear to the Court that such defendant is an infant, or person of weak or unsound mind, not so found by inquisition, so that he is unable of himself to defend the suit, the Court may upon the application of the plaintiff order that one of the solicitors of the Court be assigned guardian of such defendant, by whom he may appear to and answer, or may answer the bill and defend the suit.

Service of Subpœna and notice before appointment of Guardian. But no such Order is to be made unless it appears to the Court on the hearing of such application, that the subpœna to appear and answer the bill was duly served, and that notice of such application was after the expiration of the time allowed for appearing or for answering the bill, and at least six days before the hearing of the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such subpœna, and (in the case of such person being an infant, not residing with or under the care of his father or guardian) that notice of such application was also served upon or left at the dwelling-house of the father or guardian of such infant, unless the Court, at the time of hearing such application, thinks fit to dispense with such last mentioned notice.

English Orders on this practice. The English Orders on this practice are as follow:— Order 29 of 1845 corresponds to the above Order 20, and is as follows:—(the parts differing from the words of the above Orders are Italicised).

English Order XXIX. If any Defendant, not appearing to be an infant or a person of weak or unsound mind, unable of himself to defend the suit, *is*, when within the jurisdiction of the Court, duly served with a Subpœna to appear *to or to appear to* and answer a Bill, and refuses or neglects to appear thereto within *eight* days after such service, the Plaintiff

may, after the expiration of such eight days, and within *three* weeks from the time of such service, apply to the *Record and Writ Clerk* to enter an appearance for such Defendant; the *Record and Writ Clerk* is to enter such appearance accordingly, upon being satisfied by affidavit that the Subpœna was duly served upon such Defendant personally, or at his dwelling-house or usual place of abode; and after the expiration of such *three* weeks, or after the time allowed to such defendant for appearing has expired, in any case in which the *Record or Writ Clerk* is not hereby required to enter such appearance, the Plaintiff may apply to the Court for leave to enter *such* appearance for such Defendant; and the Court, being satisfied that the Subpœna was duly served, and that no appearance has been entered for such Defendant, may, if it *so* thinks fit, order the same accordingly.

English Order XXX.

The 30th English Order of 1845 is in the precise words of the first section of the above Order 21.

XXXII. Appointment of Guardian.

The 32nd English Order of 1845 is in the precise words of the second and third section of the above Order 21. Except that the last word in the English Order is "service," where the above reads "*notices*," but this evidently causes no difference in the meaning of the language.

Process of Contempt abolished.

The New Orders having provided ample means for proceeding with a cause in the absence of the Defendant, and under the form of Bill now used, a discovery (except in bills for discovery alone) not being required, the process of contempt is now abolished.

Under the above 20th Order, answering to the English 29th Order of 1845, the appearance cannot be entered by the Plaintiff for the Defendant, as of course, if four weeks have elapsed from the service of the Subpœna, but a motion must be made for leave to enter the appearance. This should be made within a reasonable time, or the Court may require a notice to be given to the Defendant, or even a new Subpœna to be taken out. (*Radford* vs. *Roberts*, 2 Hare, 96; *Bointon* vs. *Parkinson*, 7 Jurist, 367; *Devenish* vs. *Devenish*, 7 Jurist, 841; *Edmonds*

vs. *Nicholls*, 6 Beaven, 334; *Walker* vs. *Hurst*, 13 Simons, 490.)

These cases were decided under the 8th English Order of 1841, but it is apprehended that the same principle would now apply; for under the new Order the Court will only direct the appearance to be entered "*if it think fits.*"

Under the English Orders of 1845, answering to the 2nd and 3rd classes of the above 21st Order, the following cases have been decided:—Of the six days which the notice has to run, one day may be Sunday, (*Brewster* vs. *Thorpe*, 11 Jurist, 6.) The Order applies in cases of absent Defendants, being infants, or of unsound mind, (*Anderson* vs. *Stather*, 10 Jurist, 383; *Biddulph* vs. *Lord Camoys*, 7 Beaven, 580). As to on whom the service may be made, see *Hitch* vs. *Wells*, 8 Beaven, 576. In case of the death of the Guardian, there must be another application, in the same manner, (*Needham* vs. *Smith*, 6 Beaven, 130.)

The appearance, it will be seen by the foregoing Orders, must in ordinary cases be within fourteen days after service of the Writ. Where the Defendant (an infant or of unsound mind) is abroad, an application to serve the subpœna must be made, under the Order as to absent Defendants, (for which see a subsequent chapter), and after the time for appearance the Plaintiff may proceed as by the above Order prescribed.

CHAPTER V.

Absent Defendants.

In cases where the Defendant is out of the jurisdiction, the proceedings are to be according to the following 22nd, 23rd, and 24th Orders:

1850. XXII. Where a Defendant in any suit is out of the jurisdiction of the Court.

Absent Defendants.

1. The Court, upon application, supported by such evidence as shall satisfy the Court in what place or country such Defendant is or may probably be found, may order that the Subpœna *to appear to and answer, or to answer the Bill*, may be served on such Defendant in such place or country, or within such limits as the Court may think fit to direct.

Service of Subpœna out of jurisdiction.

Time to be limited for appearance.

2. Such Order is to limit a time (depending on the place or country within which the Subpœna is to be served) after service of the Subpœna, within which such Defendant is to appear to the Bill, and also a time within which such Defendant is to answer or demur; or obtain from the Court further time to make his defence to the Bill.

Service of copy of Bill and Order.

3. At the time when such Subpœna shall be served, the Plaintiff is also to cause such Defendant to be served with a copy of the Bill and a copy of the Order, giving the Plaintiff leave to serve the Subpœna.

In default, Order for appearance by Plaintiff.

4. And if, upon the expiration of the time for appearing, it appears to the satisfaction of the Court that such Defendant was duly served with the Subpœna, and with a copy of the Bill and a copy of the Order, the Court may, upon the application of the Plaintiff, order an appearance to be entered for such Defendant.

1850.
XXIII.
Form of Affidavit.

Affidavits, filed for the purpose of proving the service of a Subpœna upon any Defendant, are to state when, where and how, such Subpœna was served, and by whom such service was effected.

Order as to costs in such cases.

The Plaintiff, having duly caused an appearance to be entered for any Defendant, is entitled as against the same Defendant to the costs of and incident to entering such appearance, whatever may be the event of the suit; and such costs are to be added to any cost which the Plaintiff may be entitled to receive from such Defendant, or set off against any costs which he may be ordered to pay to such Defendant; but payment thereof is not to be otherwise enforced, without the leave of the Court.

A Plaintiff may afterwards enter his own appearance.

A Defendant, notwithstanding an appearance may have been entered for him by the Plaintiff, may afterwards enter an appearance for himself in the ordinary way, but such appearance by such Defendant is not to affect any proceeding duly taken, or any right acquired by the Plaintiff under or after the appearance entered by him, or to prejudice the Plaintiff's right to be allowed the costs of the first appearance.

In cases where the Defendant is out of the jurisdiction, and the Plaintiff cannot discover his residence, under some special circumstance, proceedings may be had by means of advertising, under the following Order:

Absconding Defendants.

1850.
XXIV.

In case it shall appear to the Court by sufficient evidence that any Defendant, against whom a Subpœna *to appear and answer, or to answer a Bill*, has issued, has been within the jurisdiction of the Court at some time, not more than two years before the Subpœna was issued, and that such Defendant is *out of the jurisdiction of the Court*, or that upon inquiry at his usual place of abode (if he shall have had any) or at any other place or places where, at the time the Subpœna was issued, he might probably have been met with, he could not be found so as to be served with Process, and that in either case there in just ground to believe that such Defendant is gone out of the *jurisdiction*, or otherwise absconded, to avoid being served with Process, then and in such case the Court may order that such Defendant do appear at a certain day, to be named in the Order; and a copy of such Order, together with a notice, to the effect set forth *in Schedule C. appended to these Orders*, may, within fourteen days after such Order shall be made, be inserted in the *Canada Gazette*, and be otherwise published as the Court shall direct; and in case the Defendant shall not appear within the time

limited by such Order, or within such further time as the Court shall appoint, then, on proof made of such publication as aforesaid of the said Order, the Court may order an appearance to be entered for the Defendant, on the application of the Plaintiff

The following is the Form in Schedule C.

A. B., take notice, that, if you do not appear pursuant to the above Order, the Plaintiff may enter an appearance for you, and the Court may afterwards grant to the Plaintiff such relief as he may appear to be entitled to on his own shewing.

English Order XXXIII.

The English Order 33, of 1845, is in the words of the above Order 22, with the exception of a few words not materially affecting the sense. In the first section in the English Order, the words are "*Subpœna to appear to or to appear to and answer*", and the above Order reads "to appear to and answer or to *answer*", saying nothing of a Subpœna to appear merely.

In the second section of the English Order there are the words ("if an answer be required") and the word "plead" is introduced. The difference there is, that in this country, the Order must *in all cases* state the time within which the Defendant is to answer or demur. Pleas in Equity, are, by the Orders of 1850, entirely abolished in this country, as will be seen by the subsequent Orders, and therefore the word does not occur in the above Order 22.

The Court exercises a discretion on the application for the Order to serve a Defendant abroad, in view of all the circumstances, (*Whitmore* vs. *Ryan*, 4 Hare 612; 10 Jurist 368).

After such service, the cause may be carried on to hearing, in the usual way, and in default of *Answer*, the Bill taken *pro confesso* as prescribed by the Orders.

The above Order 23 is in the precise words of the English Orders 34, 35, and 36 of 1845.

English Order XXXI. Absconding Defendants.

The above Order 24 is taken from the English Order 31 of 1845, which is in the following words:—

In case it appears to the Court by sufficient evidence,

that any Defendant, against whom a Subpœna to *appear or* to *appear* to *and answer* a bill has been issued, has been within the jurisdiction of the Court at some time not more than two years before the subpœna was issued, and that such Defendant is *beyond the seas*, or upon inquiry at his usual place of abode (*if he had any*), or at any other place or places where, at the time when the subpœna was issued, he might probably have been met with, he could not be found so as to be served with process, and that in either case there is just ground to believe that such Defendant is gone out of the realm, or otherwise absconded, to avoid being served with process, then and in such case the Court may order that such Defendant do appear at a certain day to be named in the Order; and a copy of such Order, together with a notice thereof to the effect set forth *at the foot of this Order*, may, within fourteen days after such Order made, be inserted in the *London Gazette*, and be otherwise published as the Court directs; and in case the Defendant does not appear within the time limited by such Order, or within such further time as the Court appoints, then, on proof made of such application as aforesaid of the aforesaid Order, the Court may order an appearance to be entered for the Defendant on the application of the Plaintiff.

The notice appended is in the words of that above given, at the foot of Order 24.

Under the English Order 31 of 1845, answering to the above Order 24, it has been decided, that it is not necessary to prove that the Defendant absconded to avoid process in that particular suit. (*Cope* vs. *Russell*, 2 Phillips, 404; 12 Jurist, 105.)

CHAPTER VI.

Demurrer.

Demurrer must be within fourteen days after appearance.

If the Defendant is advised that the Plaintiff's bill is, for any thing apparent on the face of it, bad in law, and the Plaintiff therefore not entitled to the relief sought by the bill, he may, as we have seen, demur. This demurrer must be filed, and an office copy served on the Plaintiff's Solicitor within fourteen days from the time of appearance entered. In counting this time, the day of appearance is exclusive and the day of demurring inclusive. When the demurrer is filed, either party may set it down with the Registrar to be argued on præcipe. Eight days' notice must then be given to the opposite party of the day of argument, and care must therefore be taken, in setting down the demurrer, to have it set down for a day which will leave time for the eight days' notice.

The following are the rules governing this practice :—

1850. XXVI. Demurrer, fourteen days.

A Defendant may demur alone to any bill, within fourteen days after his appearance thereto, but not afterwards. It needs not be entered with the Registrar; but, upon the filing thereof by a defendant, either party is to be at liberty to set the same down for argument immediately.

Setting down.

The former practice was to allow the demurrer, unless the Plaintiff set it down to be argued within a limited time.

The Rule, under which the eight days' notice is required, is the 158th Order, of January, 1845, which, as so *far as it is consistent* with the New Orders, is still in force. It is as follows :—The parts italicised are inconsistent with the New Orders, and therefore not in force.

Order of 1851. Eight days notice of argument of demurrer.

[*That no subpœna to hear judgment shall be sued out in any case but*] the party setting down the [*plea or*] demurrer, to be argued, [*or the cause to be heard*] shall give a notice in writing, stating that the [*plea or*] demurrer

[*or the cause*] has been entered in the Cause Book with the Registrar for argument [*or hearing*], and stating the day on which the same is to be argued [*or heard*]. And that such notice shall be served eight days before the day of argument [*or hearing*], and that it shall be the duty of the party entering such [*plea or*] demurrer, [*or cause*] to be argued [*or heard*], at the time of entering thereof to furnish the Registrar with the day on which the same is to be argued [*or heard*], in order that the same may be entered in the Cause Book.

The 111th Order of 1842, under which the Plaintiff had a time, within which to set down the demurrer, is expressly repealed, and 97th Order of 1842, allowing the Defendant to set it down after ten days, is also abolished, being not "consistent with" the above 26th Order. The demurrer may now be set down and disposed of.

The above language of this Order, so far as it abolishes the subpœna to hear judgment, is not now in force, because the 69th New Order establishes the practice of Subpœnas to hear judgment. The rule does not apply to pleas, because they are abolished. And it does not apply to setting down Causes, because the 69th New Order provides for a different kind of notice, namely a service of the Subpœna to hear judgment. But, although the 69th Order says that Demurrers as well as Causes may be set down in vacation, it does not provide for any notice or Subpœna in respect of demurrers, and therefore as to them, we have to refer to the above Order. The 69th Order says that "*The party setting down a Cause*" &c., must sue out a Subpœna, but it does not make any provision of the kind for the setting down of demurrers.

The above Order only applies to demurrers.

69th new Order requires no subpœna ad audiendum for the hearing of demurrer.

The Defendant may couple a demurrer with an answer, at any time within the time for answering; but the demurrer must not be to the whole material part of the Bill with a mere denial of fraud and combination. Some fact must be admitted, traversed or denied. (*Wetherhead* vs. *Blackburn*, 2 Vesey and Beames 123; *Tomkin* vs. *Lethbridge*, 9 Vesey 179, 463; *Baker* vs. *Mellish*, 11 Vesey 73).

CHAPTER VII.

The Answer.

The answer formerly consisted of a complete, literal and substantial answer to the Interrogatories of the Bill. There are now no Interrogatories to the Bill, (except in Bills for Discovery, as to which the practice is peculiar,) and the answer may be as short a statement of the defence as the Defendant may think proper to put in. The answer must be filed within one month—twenty-eight days,—the first being inclusive, and the last exclusive after appearance, unless further time be granted, which may be done under certain circumstances on application to the Master as provided by the following Orders. The Order, by which the form of the answer is now governed, is the 27th Order of 1850.

Form of, and time for answer.

1850. XXVII. One month.

A Defendant is to answer or demur, not demurring alone, to any original bill or bill amended before answer, within one month after appearance thereto has been entered by or for him, or from the time of amendment, as the case may be. Where the Plaintiff amends his bill after answer, any Defendant desiring to answer the same must put in his answer thereto within eight days after service of the Subpœna to answer the amended bill, or within such further time as the Master may allow; and a Defendant, being served with Subpœna to answer an amended bill, praying an injunction to stay proceedings at law, and desiring to avoid a motion for an injunction on affidavit of the truth of the amendments, has for that purpose only eight days after service of Subpœna to answer, within which he is to answer or demur to such amended bill.

Eight days to amended Bill.

The commencement and conclusion of the answer shall be in the form prescribed in Schedule D. to these Orders appended. It must be verified by the oath of the Defendant, as heretofore, but needs not be signed by counsel. It shall consist of a clear and concise statement of such defence or defences as the Defendant may desire to present. The silence of the answer as to any of the statements of the bill shall not be construed into an implied admission of their truth; and statements introduced into the answer, for the purpose merely of preventing such implied admission, shall be considered impertinent. Provided always, that nothing herein contained shall be construed so as to prevent a Defendant from introducing into his answer any matter which may be material, for the purpose of preventing an injunction from being granted, or of procuring the same to be dissolved.

Answer must be sworn to.

Must be concise.

Omission to deny Bill, no admission.

Impertinence.

The following is the form given in the Schedule.

COMMENCEMENT AND CONCLUSION OF ANSWER.

The answer of C. D., one of the Defendants to the bill of complaint of A. B., complainant.

This Defendant, for defence to the said bill, says that, &c. (state the defence as succinctly as can be done consistently with due certainty, and in any language suitable to the purpose.)

This Defendant therefore humbly insists that (where the Defendant requires any peculiar relief, it should be specially stated), and prays to be hence dismissed with his reasonable costs in this behalf wrongfully sustained.

A second or supplemental answer could only be filed, according to the old practice, under very special circumstances, and was very rarely permitted. The practice is somewhat relaxed under the following Orders.

1850. XXIX. Supplemental answer on motion.

It shall be competent to the Court, at any time, in furtherance of justice and upon such terms as may be proper, to permit a supplemental answer to be filed, for the purpose of putting new matter in issue. Leave to file a supplemental answer shall be applied for by motion, which shall set forth the proposed answer, and shall state the ground upon which the indulgence is asked.

Notice of this motion must be served upon the solicitors of all parties to this suit; and, when any party has no solicitor, then upon such party, unless the Court under special circumstances shall dispense therewith; and it must be supported by such evidence as shall satisfy the Court of the propriety of permitting such supplemental

Motion how made.

answer under the circumstances, having reference to the subject matter of the answer, to the Defendant's former answer, and to the stage of the cause in which the application is made.

There is no such Order in England, but it is now necessary here, since the first answer may under the present practice be short, and not in the nature of a discovery.

The ostensible object of a decree in Equity is to give that relief to all the parties, Defendants as well as Plaintiffs, which the facts warrant, and in furtherance of that view, is the following Order:

1850. XXVIII. Decree may be so framed as to give the proper relief to the defendant as well as the plaintiff.

Where, in order to complete justice, relief ought to be given to the Defendant as well as the Plaintiff, or to the Defendant alone, it shall be competent to the Court, if it see fit, so to frame the decree as to attain such object, whenever the Defendant's right to relief grows out of the same transactions as form the subject matter of the Bill; and the facts necessary to ground such relief may be stated by the Defendant in his answer as part of his case. Provided, that nothing herein shall be construed to authorise a defendant to state in his answer any distinct and independent matters, as the foundation for relief, not connected with, and growing out of, the case made by the bill; and it shall in all cases be discretionary with the Court whether to grant such relief upon the answer, or to direct a separate suit to be instituted.

Application for time to answer is to the Master.

The application for further time to answer must be made to the Master, by taking out a warrant returnable on the fourth day from its date, that is, allowing two clear days between its date and the return; and it must be returnable before the ordinary time for answering has expired; otherwise the Master cannot entertain the application, having no jurisdiction, but a special motion must be made to the Court.

The practice before the Master in these applications is under the following Orders of 1846, which are not repealed except as to the parts italicised in brackets:—

1846. 181. Application to Master for time to answer.

It is ordered—That the Master in ordinary of this Court shall hear and determine all applications for time [*to plead*] answer or demur, [*and for leave to amend Bills, and for leave to withdraw replication and amend Bills*], and for enlarging publication, and either party shall be at liberty to appeal by motion to the Vice Chancellor from the Order made by the Master upon such application.

The above language with regard to amendments is repealed by the 12th and 13th New Orders, which provide for amendments, either as of course, or on motion.

Another Order of 1846 states the practice on the warrant:

1846. 183. Warrant to run two clear days.

That such applications to the Master shall be made by taking out a warrant which shall be under-written with the object of the application, and the same shall be served two clear days before the return thereof.

The conditions of the Order for time, are prescribed by the 184th and two following Orders of 1846, as follows:

1846. 184. Condition of Order for time. Defendant must appear.

That in every Order granted by the Master for further time to answer shall be made a condition of such Order that the defendant shall enter his appearance with the Registrar and consent, that in case of default the plaintiff shall be entitled to a writ of sequestration, unless under any special circumstances the Master shall otherwise direct, and which circumstances shall be shortly stated in the Order made upon such application.

The use of the above is not very clear. Unless the defendant had already appeared, or the plaintiff had appeared for him, in which case his own appearance is not necessary, the time could not be running against him for answering, and therefore the application could hardly be necessary. The rule has consequently not come in question in practice.

1846. 185. Costs on applications for time to answer.

That upon such applications aforesaid the Master shall be at liberty to direct, and shall accordingly in the Orders made thereon direct whether the costs of the application shall be costs in the cause, or whether such costs, or any part thereof, shall be paid by any of the parties personally; and in the latter case the Master shall in such Order either fix the sum to be paid for such costs or tax the same at his discretion, and the party, to whom such costs are directed to be paid, shall be entitled to sue out a subpœna for the same, or the Master may in his discretion award costs to neither party.

1846. 186. Orders for time drawn up by the Master.

That the Master shall draw up the Orders upon such applications aforesaid in a short form, and the same, when signed by him, shall be entered in a book to be kept for that purpose in the office of the Master; and such Orders shall then be binding (unless reversed or varied on ap-

peal), and shall be enforced in like manner as if made by the Court; and the original Order or any duplicate thereof (which the Master is to grant on the application of any party) shall be a sufficient warrant to every officer of the Court to do the act therein mentioned, or to permit the same to be done, and each party shall be at liberty to inspect the entry of all such Orders in the said Entering-book without fee.

Defendant within one month may answer and demur, but must not demur alone.

The answer must, as we have seen, come in within one month after appearance, unless further time is given; but the answer filed needs not be to the whole bill. So that there is some answer, the defendant may couple that answer with a demurrer to the Bill, provided he does not demur to the whole Bill, but answers as to some part. The demurrer, thus coupled with the answer, may then be set down by either party, and, if it is overruled, the defendant must answer over, and counsel should at once ask the Court for time to answer, or the Plaintiff may proceed by traversing note, under the 32nd New Order.

Must clearly distinguish part answered from part demurred to.

If the demurrer is allowed, the Plaintiff's case fails as to so much of the Bill as has been demurred to, and he can only rely on the remaining part at the hearing. The answer and demurrer must clearly state and distinguish the respective parts of the Bill to which the answer and the demurrer relate.

The practice may be considered somewhat relaxed in that respect by the following Orders, but still there should be clearness and particularity observed in stating what parts of the Bill the demurrer is meant to govern. Otherwise, were the demurrer allowed, it might be difficult to say how much of the Bill should be struck out by amendment.

It had been held when the defendant answered and demurred, that a demurrer was bad if it had extended to any part of the Bill which the answer also covered. This is altered by the following Order:

1842. 113. Demurrer not bad because answer extends to part.

That no demurrer *or plea* shall be held bad and overruled upon argument only, because the answers of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

The following rule also remains in force, except, like the above, as the "plea."

1842. 114. Demurrer or plea not bad for covering less than it might.

That no demurrer *or plea* shall be held bad and overruled upon argument only, because such demurrer *or plea* shall not cover so much of the Bill as it might by law have extended to.

The answer is sworn before a Master of the Court, and manner of swearing it is prescribed by the following Order.

Mode of taking answers.

That in the case of answers the following oath or affirmation shall be administered to the party by the Master or Master Extraordinary.

1837. 24. Form. of oath.

"You do swear, (or affirm as the case may be), that "you have read (or heard read) this your answer sub- "scribed by you, and that you know the contents thereof, "and that the same is true of your own knowledge ex- "cept as to matters which are therein stated upon your "information and belief, and as to those matters you be- "lieve it to be true."

That the Master or Master Extraordinary shall then subscribe or endorse on the answer a Jurat in the following form:—

Form of Jurat.

"The Defendant C—— D—— on the ———day of "——— in the year of our Lord, &c., appeared before "me at my chambers in the ——— of ——— in the "District of ——— and answered that he had read the "foregoing answer, and signed the same in my presence, "and thereupon was sworn (or affirmed) before me that "he had read (or heard read) the foregoing answer sub- "scribed by him, and that he knew the contents thereof, "and that the same was true of his own knowledge ex- "cept as to matters which are therein stated to be on "his own information and belief, and as to those matters "he believed it to be true."

That in the case of an illiterate Defendant the Jurat shall run thus:—

In case of an illiterate person.

"The Defendant C—— D—— not being able to read "or write, E——F——, Solicitor for the said Defendant, "was sworn that he had truly and faithfully read the "contents of this answer to the said C—— D—— and "that he appeared perfectly to understand the same: "and the said C—— D—— was thereupon sworn that "he had heard the said answer, subscribed by him with

" his mark, read, and knows the contents thereof, and " that the same is true of his own knowledge except as " to matters which are therein stated to be on his in- " formation, and as to those matters he believes it to be " true."

How to be folded and transmitted.

That the Master or Master Extraordinary shall fold the answer, and bind it with tape, and set his seal at the several meetings or crossings of the tape, endorse his name on the outside and direct it thus "To , Esquire, Registrar of the Court of Chancery, City of Toronto." The Master or Master Extraordinary shall immediately deposit the packet so directed in the nearest Post-Office, and endorse thereupon " Deposited in the Post-Office at —— this —— day of —— by me A—— B—— a Master or Master Extraordinary," as the case may be ; and he shall enclose at the same time the Registrar's fee of two shillings and sixpence for filing the answer. The postage and fee shall be paid by the Defendant or his solicitor.

1843. 134, 135. No answer or demurrer to be deemed filed until copy served.

By Order 134 of 1843, the copies of proceedings for service, are first compared with the record filed, and then stamped and marked by the Registrar. And by Order 135 of 1843, no answer or demurrer is considered filed, until a copy of it, so authenticated, is served upon the Plaintiff's Solicitor or Agent. This practice remains in force.

When the answer was to the whole Bill and interrogatories, it was exceptionable if every part was not completely answered. The exceptions were argued before the Master, and, if they were allowed, the Defendant was compelled to file a further answer. This practice is now of course abolished, or it would clash with the 28th New Order. The 30th New Order provides :—

1850. XXX. Exceptions abolished.

No exceptions to an answer on the ground of insufficiency shall in future be filed ; nor shall any process of contempt be issued for the purpose of compelling an answer. But, if upon the hearing of any cause, petition, or motion, the Court is of opinion that any pleading, petition, or affidavit, which has not been referred for impertinence, or any part of such pleading, petition, or affidavit, is improper or of unnecessary length, the Court may either order such pleading, petition, or affidavit, to be taken off the file, or may declare such pleading, petition, or affidavit, or any part thereof, to be improper or of unnecessary length ; and, if it shall declare such pleading,

petition, or affidavit, to be of unnecessary length, may direct payment of a sum in gross in lieu of taxed costs therefor, or may fix the length at which the same shall be considered on taxation; or may direct the taxing master to look into such pleading, petition, or affidavit, and distinguish what parts or part thereof are or is improper or of unnecessary length; and may direct the taxing-master to ascertain the costs occasioned to any party by such parts or part thereof, as in the one case may have been declared to be, and in the other case may have been distinguished as being improper or of unnecessary length; and may make such order as is just for the payment, set off, or other allowance of such costs, by the party, his solicitor or counsel, as to the Court may seem just.

Costs of pleadings unnecessarily long.

1850. XLVII.

A notice of the filing of any appearance, or pleading, must be always served on the opposite party, under the following rule.

Notice of filing appearance and pleadings.

When any solicitor or party shall cause an appearance to be entered, or an answer, demurrer or replication to be filed, he shall on the same day give notice thereof to the solicitor of the adverse party, or to the adverse party himself, if he act in person.

CHAPTER VIII.

The Replication.

Replication.

After the filing of the answer, the next proceeding is to file the Replication, which must be done by the Plaintiff within the time limited by the following Orders, or to set down the cause to be heard upon Bill and answer.

Setting down cause on Bill and answer.

The effect of setting down the cause on Bill and answer is that the truth of the answer is admitted, and the Plaintiff must rely upon what he finds in the answer, and on nothing more, as his evidence, to support his claim to a decree. He cannot go out of the answer to prove his case, (*Jones* vs. *Griffith*, 8 Jurist, 733). Under the old practice, when the Defendant was compelled to make full discovery of all the facts, in answer to the specific Interrogatories of the Bill, he frequently could not avoid making such admissions as were sufficient to sustain the Plaintiff's case, notwithstanding anything else in the answer contained. In such cases the Plaintiff might at once, without replying to the answer, set down the cause.

If he replied, the Defendant was then, as now, at liberty to go into evidence ; but the Plaintiff might and still may read from the answer, as true, to support his cases any passages he may think proper as evidence. Under the present practice the Defendant, not being compelled to make full discovery, is unlikely to state such a case on his answer as will alone sustain the Plaintiff's case, and therefore causes will very seldom be set down to be heard on Bill and answer.

Not likely to be now usual.

The replication will then in most cases be necessarily filed. 1850.

No subpœna to rejoin is hereafter to be issued, and only one replication is to be filed in the cause, unless the Court otherwise orders; and the replication is to be in the form set forth in Schedule E. to these Orders appended, or as near thereto as circumstances admit and require; and upon the filing of the replication the cause is to be deemed to be completely at issue. XLV. Cause put at issue by replication.

The following is the form :—

Between A. B. *Plaintiff*,

and

C. D., E. F., G. H., &c. *Defendants*.

The Plaintiff in this cause joins issue with the Defendant C. D. (*all the Defendants who have answered, or against whom a traversing note has been filed*), and will hear the cause upon bill and answer against the Defendant E. F. (*all the Defendants against whom the cause is to be heard on bill and answer*) and on the order to take the bill as confessed against the defendant G. H. (*as the case may be*). Form of replication.

The subpœna to rejoin had been already abolished by the 157th Order of 1845, which gave the following very short form of replication. "The Plaintiff replies to the Defendant's answer." The above form under the New Order, it will be seen, is to meet any case of several Defendants. If all the Defendants have answered, the first clause will of course be sufficient, and so on, according to the circumstances. The 157th Order of 1850 is repealed, and the replication will therefore always commence according to the above form under the Order of 1850. Subpœna to rejoin abolished in 1845.

There should be only one replication to all the answers, and, a replication to one answer having been filed, and another answer afterwards coming in, an application to the Court will be required to withdraw the first one. (*Stinton* vs. *Taylor*, 4 Hare, 608; 10 Jurist, 386).

The Plaintiff (not obtaining an Order for leave to amend his bill) must either file his replication, or set down the cause to be heard on bill and answer, within one month after the filing of the last answer. The plaintiff having obtained an order for leave to amend after answer, must 1850. XLVI. Replication one month after last answer.

either file his replication, or set down the cause to be heard on bill and answer. within the times following, viz. :

Amendment, but no answer, plaintiff must reply after eight and within fourteen days.

1. Where the plaintiff amends his bill, and no answer is put in thereto, and no warrant for further time to answer the same is served within eight days after service of the subpœna to answer the amended bill, the plaintiff is, after the expiration of such eight days, but within fourteen days from the time of such service, either to file his replication, or set down the cause to be heard upon bill and answer. Otherwise any defendant may move to dismiss for want of prosecution.

Within fourteen days after further time to answer refused.

2. Where the plaintiff amends his bill after answer, and a defendant, within eight days after the service of the subpœna to answer the amended bill, serves a warrant for further time to answer the amendments, but the Master refuses to grant such further time, the plaintiff is, within fourteen days after such refusal, either to file his replication, or to set down the cause to be heard on bill and answer. Otherwise any defendant may move to dismiss the bill for want of prosecution.

If amendments answered. Replication within fourteen days after answer.

3. If a defendant puts in an answer to amendments, the plaintiff must, within fourteen days after the filing of such answer, either file his replication, or set down the cause to be heard on bill and answer, unless in the meantime he obtains from the Court a special order for leave to amend the bill. Otherwise any defendant may move to dismiss the bill for want of prosecution.

The above introductory clause of the 46th Order is taken from Article 37 of the English Order 16 of 1845.

Compared with English Orders.

Article 1 of the above Order 46 is from 38th Article of the English 16th Order. Article 2 is from Article 40 of the said 16th Order, and Article 3, from Article 41 of the 16th Order ; all with a few verbal alterations, necessary to adapt them to our practice, of never compelling an answer. The authorities on this subject will be found under the Orders as to Dismissal of Bill.

CHAPTER IX.

Traversing Note.

Another mode of proceeding, which the Plaintiff may adopt, if, after the appearance the Defendant neglect to answer, is under the following Order :—

1850. XXXII. Traversing note.

At the expiration of the time allowed to a defendant to answer or demur (not demurring alone) to any original bill or bill amended before answer, if such defendant have filed no answer or demurrer, the plaintiff may file a note to the following effect : "The plaintiff intends to proceed with his cause as if the defendant had filed an answer traversing the case made by the bill."

Form.

Copy to be served.

A traversing note having been filed, a copy thereof shall be served on the defendant against whom the same shall be filed, and thereupon such note shall have the same effect as if such defendant had filed an answer traversing the whole bill on the day on which such note shall be filed.

Same effect as answer.

After service of a copy of a traversing note, filed as aforesaid, a defendant is not at liberty to answer or demur to a bill without the special leave of the Court ; and the cause is to stand in the same situation as if such defendant had filed an answer to the bill on the day on which the note was filed.

In case of demurrer overruled.

Where a demurrer to the whole bill is overruled, the plaintiff may immediately file his note in manner and with the effect hereinbefore directed, unless the Court, upon overruling such demurrer, give time to the defendant to answer or demur ; and in such case, if the defendant shall file no answer or demurrer within the time so allowed by the Court, the plaintiff may, on the expiration of such time, file such note.

The above Order is from 52nd, 55th, 56th, 57th, and 58th English Orders of 1845, *mutatis mutandis*. All reference to Pleas and Supplemental Bills is necessarily omitted, as also provisions pointing to the Plaintiff's right to compel an answer. The Order would seem not to apply to Infant Defendants (*Emery* vs. *Newson*, 10 Simons, 564). It is irregular, if answer has been sworn, (*Rigby* vs. *Rigby*, 6 Beaven, 265). There seems to be no good reason why it may not apply to cases of Defendants out of the jurisdiction, (*Moss* vs. *Buckley*, 2 Phillips 628; *Laurie* vs. *Burn*, 12 Jurist, 598; but see *Anderson* vs. *Stather*, 11 Jurist, 96). Service of the note should be proved at the hearing (*Evans* vs. *Williams*, 6 Beaven, 118). As to the effect of the Note, with a view to the evidence, (see *Martin* vs. *Norman*, 2 Hare, 596.) At the hearing the Plaintiff must prove his case, and the Court will make such a decree as the evidence warrants.

Some of the above cases were decided prior to the Orders of 1845, but they went upon the Orders of 1844, under which there was a similar proceeding, and are therefore applicable to the present practice.

CHAPTER X.

Evidence.

The cause being at issue, each party has two months' time to examine witnesses, and a material alteration, effected by the recent Orders, consists of the examination by each party of the opposite party, if it is desired. The time for taking evidence was formerly three months. The rule to produce witnesses, formerly in use, is abolished. Written Interrogatories are now dispensed with.

The following are the Orders :—

1850.
LII. Examination of witnesses on fourteen days' notice.

Immediately after the replication shall have been filed, each defendant may give notice of his intention to proceed to the examination of witnesses ; and the plaintiff may in like manner proceed to examine his witnesses, so soon as notice of the replication having been filed shall have been duly served on all the defendants who have filed an answer, or against whom a traversing note has been filed. Such notice must be in writing, and, beside specifying the time and place when and where, and before whom, such examination is to be proceeded with, must contain the name of each witness to be examined, his degree, and place of

abode. This notice must be served on the solicitors of all the other parties entitled to examine witnesses, and in case any such party has no solicitor, upon such party, at least fourteen clear days before the day therein named for proceeding to examine witnesses.

LIII. Interrogatories abolished.

No written interrogatories for the examination of either witnesses or parties, either before or after decree, shall henceforward be filed, except by direction of the Court; such examinations shall be *viva voce*, and may be conducted either by the parties, their solicitors or counsel.

LIV. Witnesses in County of York must be examined before the Court.

Witnesses (whether parties to the record or not), residing within the County of York, shall be examined before the Court, as the Court shall appoint; and witnesses (whether parties to the record or not) residing in any other county than the County of York, may be examined before the Court by consent of parties, or at the instance of any party willing to pay the extra expense, if any, thereby incurred. In other cases witnesses (whether parties to the record or not) shall be examined at the county town of the county in which such witnesses reside. Provided that nothing herein contained shall be construed to prevent an examination of witnesses from being had at any place that may be fixed by consent of parties.

Other witnesses may be so examined.

LV. Examination before examiners in the country.

The examination of witnesses, (whether parties to the record or not) when not taken before the Court, is to be taken by some one of the examiners, unless otherwise ordered; and, where any of the witnesses reside out of the jurisdiction, it may be taken by commission as heretofore.

These Orders are peculiar to this country, and it is believed that they effect a material improvement in the practice. Having been for so short a time in force, no decisions of importance have taken place under them.

The mode of proceeding is as follows, when the examination is in Toronto:—The subpœna for witnesses having been taken out, an application is made to the Chancellor to name a day for examination. This he does by signing an appointment for a day not less than fourteen days distant, and notice of the names of the intended witnesses is then given to the opposite Solicitor, stating the time when they will be examined. The witnesses should each be served with a copy of the subpœna and a copy of the appointment attached, and paid the same fees as witnesses are al-

lowed in the Queen's Bench. The witness having been sworn by the Registrar, one of the Judges takes down his evidence (the full Court being sitting), and at the conclusion of the examination in chief, cross-examination, and re-examination respectively, the evidence is read over to the witness and signed by him. After publication has passed, the Registrar furnishes to the Solicitors, who request them, copies of the depositions, and they are read at the hearing in the same manner as formerly.

A large portion of the evidence is often documentary, and may be put in on affidavit under the following Order:

Jan. 1842. 120. Exhibits may be proved by affidavit.

That in cases in which any exhibit may by the present practice of the Court be proved *vivâ voce* at the hearing of a cause, the same may be proved by the affidavit of the witness who would be competent to prove the same *vivâ voce* at the hearing.

For what exhibits may be so proved, see *Daniel's Chancery Practice*, vol. 2, p. 1025 and following pages, Perkins' Edition, 1846.

Another mode of putting documents in evidence is under the following Orders, which establish a practice similar to that which has been found highly useful in the Common Law Courts.

XLV. Admission of documents may be demanded.

Any person after replication filed may give notice to the other in the form set forth in schedule F. to these orders appended, or to the like effect, of his intention to adduce in evidence certain documents; and, unless the adverse party shall consent by indorsement on such notice within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required to show cause why he should not consent to such admission, or in case of refusal be subject to pay the costs of proof; and, unless the party required shall expressly consent to make such admission, the Court shall, if the application seem reasonable, make an order, that the costs of producing any document specified in the notice, which shall be proved at the hearing to the satisfaction of the Court, shall be paid by the party so required, whatever may be the result of the cause: Provided, that, if the Court shall think the application unreasonable, the motion shall be endorsed accordingly: Provided also, that the Court may give such time for enquiry, or examination of

the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as they shall think right. If the party required shall consent to the admission, the Court shall order the same to be made. No costs of proving any document shall be allowed to any party who shall have adduced the same in evidence, unless he shall have given such notice as aforesaid, and the adverse party shall have neglected or refused to make such admission, or the Court shall have endorsed upon the motion that they do not think it reasonable to require it. The Court may make such order as they may think fit respecting the costs of the application, and the costs of production and inspection; and in the absence of a special Order the same shall be costs in the cause.

Costs.

The following is Schedule E., in the above Order referred to :—

IN CHANCERY.

Between { A. B. *Plaintiff*, and C. D. *Défendant.*

Take notice that the plaintiff (or defendant) in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the plaintiff (or defendant), his solicitor or agent, at on between the hours of and and that the plaintiff (or defendant) will be required to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and that such documents as are stated to have been served, sent or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated this day of 18 .

Yours, &c. C. R.

Solicitor or Agent (for plaintiff or defendant.)

To E. F.

Solicitor or Agent for (plaintiff or defendant).

Then describe the documents; the manner of doing which may be as follows :

ORIGINALS.

Description of the Documents.	*Dates.*	
Deed of Covenant between A. B. and C. D. of the first part, and E. F. of the second part.	1st Jan., 1850	
Indenture of Lease from A. B. to C. D.	1st May, 1850	
Letter of Defendant to Plaintiff.	12th March, 1850.	
Memorandum of Agreement between C. D. and E. F.	1st December' 1849.	
Bill of Exchange for £100 at three months, drawn by A. B. on and accepted by C. D. indorsed E. F.		

COPIES.

Description of Documents.	*Dates.*	Original or Duplicate served, sent or delivered, when, how, and by whom.
Registrar of Baptism of A. B. in the parish of	1st January, 1850.	
Letter,— Plaintiff to Defendant.	1st February, 1850.	Sent by General Post, 2nd February, 1850.
Notice to produce papers.	1st March, 1850.	Served 2nd March, 1800, on defendant's Solicitor, by E. F. of
Letter Patent of King Geo. III.	1st January, 1800.	

An important part of the evidence of either party is often taken from documents in the possession of the opposite party, and, to compel the production of such papers, there are the following rules:—

1850. XXXI. Production of papers, by either party.

Either the plaintiff or defendant may at any time after answer obtain an Order of course, requiring the adverse party to produce, within a time to be limited by the order, all deeds, papers, writings and documents in his custody or power, relating to the matters in question in the cause under oath, and deposit the same with the Registrar of the Court for the usual purposes. *Provided always, that neither the plaintiff nor the defendant shall be bound in pursuance of such order to produce any deeds, papers, writings, or documents, which a defendant now admitting the same by his answer to be in his custody or power would not be bound to produce.* Any party objecting to the production of deeds, papers, writings, or documents, in his custody or power, shall, in the affidavit to be made upon such occasion, assign the reason for his declining or refusing to produce the same; and, in case the party obtaining such order shall have reason to think that the exigency of the same has not been fully complied with, he may apply to the Court, upon notice, for an order to compel the production and deposit of such deeds, papers, writings, or documents as he may have reason to think should be produced, and may support such applications by the pleadings, or by affidavit, or both, as he may be advised; and thereupon the Court may make such order as may seem just.

On motion of course.

May be enforced by order, on motion after notice.

What documents to be produced.

Under this Order, it will often be important to consider what documents a party was, under the former practice, compellable to produce. The cases on the subject are very numerous. The Defendant can, it seems, under this Order compel the production of the documents stated in the bill as those on which the Plaintiff relies, and which are stated to be in his own possession, see *Bate* vs. *Bate*, 7 Beaven, 528; and *Taylor* vs. *Henning*, 4 Beaven, 235. These cases show, that without any such order as this, the Court would still, in some cases take means to give the defendant the inspection of documents clearly material. And it is apprehended, that now the Plaintiff would be compelled to produce any such documents as the Defendant is compellable to produce. Among the cases tending to show

what documents the Defendant is compellable to produce, are the following :—*Attorney General* vs. *Berry*, 2 Collyer, 33 ; 9 Jurist, 224 ; *Brown* vs. *Perkins*, 2 Hare 540 ; 8 Jurist, 186 ; *Atkins* vs. *Wright*, 14 Vesey, 211 ; *Sweet* vs. *Hunter*, 9 Jurist, 807 ; *Combe* vs. *Corporation of London*, 10 Jurist, 57 ; *Harris* vs. *Harris*, 4 Hare, 179 ; *Bannatyne* vs. *Leader*, 10 Simons, 230; *Edwards* vs. *Jones*, 1 Phillips, 501 ; *Smith* vs. *Duke of Beaufort*, 1 Phillips, 209 ; *Marquis of Bute* vs. *Glamorganshire Canal Company*, 1 Phillips, 681 ; *Smith* vs. *Dowling*, 10 Jurist, 63; *Flight* vs. *Robinson*, 8 Beaven, 22 ; *Steele* vs. *Stewart*, 1 Phillips, 471 ; *Woods* vs. *Woods*, 4 Hare, 83 ; *Holmes* vs. *Baddley*, 1 Phillips, 476 ; *Belshaw* vs. *Perceval*, 10 Jurist, 772 ; *Wroughton* vs. *Barclay*, 11 Jurist, 274 ; *Johnston* vs. *Tucker*, 11 Jurist, 382 ; *Price* vs. *Gordon*, 7 Jurist, 1076 ; *Grane* vs. *Cooper*, 4 Mylne and Craig 263 ; *Gerard* vs. *Penswick*, 1 Swanston, 533. In many of these cases, the right is shown to be restricted to the admissions in the answer ; but it is clear that such a limitation cannot now hold, because the answer is not now a discovery, and the Defendant may omit to name as many papers as he pleases, and the above Order permits the motion to be supported by affidavit, whereas before, the answer could not be added to by affidavit. It seems then, that now each party can be compelled to produce all papers of such character as a Defendant, admitting them to be in his possession, could formerly have been compelled to produce. In effect, all that are relevant to the issue, and as to which there is no protection on any special ground, such as that of confidential communication between Solicitor and Client.

The Order of course may be obtained upon petition or motion without notice, and the petition should specify the number of days within which the papers are to be deposited.

It may frequently happen that a Plaintiff or Defendant, when under examination, speaks of documents which were not previously known to the opposite party, and the produc-

tion of such documents can be compelled, under the following Order :

LVI. Production of documents named by party, when under examination.

Any party to the record under examination, admitting that he has in his custody or power any deeds, papers writings or documents relating to the matters in question in the cause, shall be liable, upon the order of the Court, or of an examiner or commissioner before whom he shall be examined, to produce the same for the inspection of the party examining him, for which purpose a reasonable time shall be allowed: provided always, that either party may appeal from the order of such examiner or commissioner, whereupon such examiner or commissioner shall certify under his hand the question raised, and the order thereupon, and the costs of such appeal shall be in the discretion of the Court. Provided also, that no party shall be obliged to produce any deeds, papers, writings or documents which he would have been obliged to produce heretofore.

CHAPTER XI.

Examination of Parties.

The rules under which Plaintiffs and Defendants may be examined are as follow :—

1850.

L. Any party to the record may be examined by a party in adverse interest.

Any party to a suit may be examined as a witness by the party adverse in point of interest, or by any one of several parties adverse in point of interest, without any special order for that purpose: and may be compelled to attend and testify in the same manner upon the same terms, and subject to the same rules of examination as any other witness, except as hereinafter provided. And any person, for whose immediate benefit a suit is prosecuted or defended, though not a party to the record, may be regarded as a party for the purpose of this order. Provided always, that, where it shall appear upon the hearing that any party examined under this order is united in interest with the examining party, the evidence so taken shall not be used on behalf of either the examining party, or of the examinant, but may be struck out on the hearing at the instance of any party affected thereby.

LI. Co-plaintiff and Co-defendant may be examined on points on which he is disinterested.

Any party defendant may be examined, as heretofore, upon order for that purpose, on behalf of either the plaintiff or a co-defendant, upon points as to which the party so to be examined is not interested. And any party plaintiff may, under the same circumstances, be examined by a co-plaintiff or by a defendant. Provided, that, where any person having an interest shall have been examined under this order, such evidence shall not be used on behalf of either the examining party or of the party so examined, but may be struck out upon the hearing, at the instance of any party affected thereby; but such examination shall not preclude the Court from making a decree either for or against the party examined.

Any party so examined may be cross-examined on his own behalf, confining the explanation to points on which he has been examined, under the following order :—

LVII. Cross-examination of party to the record.

Evidence taken under Order L. may be rebutted by adverse testimony. Any party examined as therein provided may be further examined, on his own behalf, in relation to any matter respecting which he has been examined in chief. And, where one of several plaintiffs or defendants, who are joint contractors, or united in interest, has been so examined, any other plaintiff or defendant, so united in interest, may also be examined on his own behalf, or on behalf of those united with him in interest, to the same extent as the party actually examined. Provided nevertheless, that such explanatory examination must be proceeded with immediately after the examination in chief, and not at any future period, except by leave of the Court.

The following Order provides some stringent remedies in the case of any party to the record neglecting to attend to be examined.

LVIII. Party to record not attending, is in contempt.

Bill may be moved to be taken *pro confesso*, or dismissed.

Any party refusing or neglecting to attend at the time and place appointed for his examination under Order L. may be punished as for a contempt; and it shall be lawful for the party desiring such examination, in addition to any other remedy to which he may be entitled, to apply to the Court, upon motion, either to have the bill taken *pro confesso*, or to have it dismissed, according to circumstances; and it shall be competent to the Court, upon such application, to order either that the bill be taken *pro confesso* against the party making default, or that it be dismissed; and, where from the circumstances of the case such order cannot be made, consistently with the rights of other parties to the suit, then it shall be competent to the Court to make such order, as to enlarging the time for passing publication, or otherwise, as to the Court may seem just.

Under the above Order 57, it might be supposed that the party examining an adverse party on the record necessarily subjects himself to the testimony that such witness may give in his own favour, if on the points on which he has been examined in chief. Under the following (59) Order, however, the examining party, whether a Plaintiff or a Defendant, may, if he is advised, omit to read any part of the testimony, and then the explanatory evidence cannot be read against him. This places the

Evidence cannot be read unless the examining party read it.

evidence merely on the same footing as any other evidence taken by a Plaintiff, when the Defendant can read the cross-examination if the examination in chief has been read. It differs from ordinary evidence taken by a Defendant, for that can be read by a Plaintiff if he thinks proper, whether the Defendant reads it or not. The following is the Order :—

LIX. All evidence may be read, if any part read.

Where the examining party uses any portion of the evidence taken under Order L. (but not otherwise), then it shall be competent for those, against whom it is used, to put in the entire evidence so taken, as well that given in chief as that in explanation.

It frequently happens, that in the examination before a Master Extraordinary in the country, the evidence is but imperfectly taken down; and, previous to the new rules, this led to much serious inconvenience, for it was only under the most special circumstances, and indeed very rarely, that a witness could be recalled. The following rule renders the practice more reasonable.

LX. Witness may be recalled, if he has been imperfectly examined before Master Extraordinary.

Whenever the evidence in a cause or any part thereof has been taken before an examiner or commissioner, and it can be made to appear that it would be conducive to the ends of justice that any of the witnesses so examined (whether parties to the record or not) should be examined before the Court upon the hearing, it shall be competent to any party concerned in interest, at any time after publication passed, to apply to the Court, by motion, supported by affidavit, for that purpose; and thereupon it shall be competent for the Court to make such order as under all the circumstances may seem just.

The time for taking the evidence is limited by the following Order :—

LXI. Publication passed in two months, unless enlarged by order.

The rules to produce witnesses and pass publication are henceforth to be discontinued. Publication is to pass without rule or order on the expiration of two months after the filing of the replication, unless such time expire in the long vacation, or is enlarged by order; but in the computation of the two months hereby allowed, or any enlargement of such time, the long vacation is not to count. If the time be enlarged by order, publication is to pass without rule or order on the expiration of such enlarged time, unless the time is further enlarged by order.

The Orders under which the time for passing publica- Application to

enlarge publication is to the Master.

tion, are the 181st Order of 1846, and the following Orders, *ante* page 42. The application is to the Master. The application must be made before the two months expire, or it would seem that the Master has not jurisdiction, for then publication has passed, and, if evidence is required, a special application must be made to the Court on motion, founded on special circumstances.

1850. LXII. Deposition in the first person.

By LXII. New Order all depositions are to be taken down in the first person. This was already the rule. If the deposition were otherwise, they could be suppressed, or their reading objected to at the hearing.

The following Order lays down some rules for the guidance of the Examiners in the country.

LXIII. Examination of witnesses in the country.

If the examination of witnesses cannot be completed in one day, and the circumstances of the case permit, the examiner is to proceed *de die in diem* during six hours of each day, between the hours of eight in the morning and six in the afternoon, until the witnesses for all parties are fully examined. Nevertheless the examiner may, if in his opinion the circumstances of the case require an adjournment, adjourn the proceedings from time to time, and from place to place, in such manner as he thinks proper; but he is in all cases to enter on the depositions any adjournment, and, where such adjournment is from place to place or otherwise than *de die in diem*, the cause or reason of such adjournment.

CHAPTER XII.

Setting Down the Cause.

Publication having passed, the cause is set down to be argued, as follows:

[1850. LXIX. Setting down cause.

Whereas the present practice, that causes can only be entered for hearing during the sittings, is productive of delay and inconvenience: It is ordered that from henceforth causes may be set down for hearing, and demurrers for argument, and the subpœnas *ad audiendum judicium* returnable on any day. The party setting down a cause to be heard must sue out a subpœna to hear judgment, which writ shall be tested on the day on which such cause shall have been set down, and shall be made returnable in one month from the test; it must be served on all necessary parties at least seven days before that on which it is returnable. So soon as any cause shall have been set down, it shall be entered by the Registrar on the list of causes for hearing, and shall be called on and heard on the day for which it shall have been so set down, or so soon thereafter as the causes standing before it shall have been disposed of.

Seven days' notice.

The cause must be set down by the plaintiff, unless he neglect to set it down within four weeks after publication has passed, and in that case any defendant can, unless he desires to move to dismiss the Bill, set down the cause to be heard under the following Order:

1850. LXVI. Defendant may set down cause after four weeks.

If after publication passed the plaintiff neglects to set down the cause to be heard, any defendant, after the expiration of four weeks, may set the same down at his own request, instead of proceeding to dismiss the Bill for want of prosecution, and may obtain a subpœna to hear judgment, and serve the same on the parties to the cause.

Arguing cause.

On the day on which the subpœna to hear judgment is returnable, the party, who has set down the cause, calls it on, and can insist on its being argued in its turn, next after the other causes which stand for that day. If not called on, it is put down to the foot of the paper. Care should therefore be taken to have a cause called on, on the day for which it is set down, and, if the opposite party applies for and obtains a postponement under any special circumstances, get some other day peremptorily fixed by the Court for the argument. The Court has recently determined, that if, when a cause is called on in its turn, the parties are unprepared, it is to be struck out of the paper, and not again set down except on a special application, and on good cause shown.

Question of necessity for time which elapses after publication and hearing.

It is submitted, that the month's time, during which, under the above Order, the defendant must wait before he can set down the cause, which it may often be desirable to do, instead of moving to dismiss, is too long; and that the practice which has obtained, namely of any party to the cause setting it down as soon as he pleases, after publication passed, would be more speedy and convenient. And also, that there is no necessity for the month's time between the setting down the cause and the day of argument. The subpœna, as has been seen, need be served only seven days before the hearing, although it must be taken out a month before. The plaintiff under this practice can cause two months to elapse after publication before the hearing.

January, 1845. 116.

The above Order 66 is like the 116th English Order of 1845, except that instead of the word *parties* the word *plaintiff* is used, and it has been held that under the English Order the co-defendants need not be served by the defendant who set the cause down. (6 Maddock 193). Our Order being differently worded, the defendant, who sets the cause down, must serve all the parties, defendants as well as plaintiff.

Proceedings on objections for want of parties.

When the answer objects to the frame of the bill for want of proper parties Plaintiff or Defendant, the case

may at once be set down for the purpose of arguing that question under the following Order :—

Plaintiff may, within fourteen days set down the cause on question of parties only.

That, when the defendant shall by his answer suggest that the bill is defective for want of parties, the Plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only, and the purpose for which the same is so set down shall be notified by an entry to be made in the Registrar's Book in the form or to the effect following, that is to say, "Set down upon the defendant's objections for want of parties," and that, where the Plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties, but the Court, if it thinks fit, shall be at liberty to dismiss the bill.

This Order is copied from the English Order 39 of 1841, under which the following cases have been decided. After the lapse of the fourteen days it is said that the Court has no jurisdiction to allow the cause to be set down on the question of parties (*Calvert* vs. *Gandy*, 1 Phillips, 518 ; *Medhurst* vs. *Allison*, 4 Hare, 497).

It is not quite clear that the first of these cases would be followed here, because the Judges felt themselves bound by the words of the Act under which the rules were framed ; and there can be no doubt, that, as a general principle, the Court may relax one of its own general rules under special circumstances. The second of the above cases also refers to the terms of an Act of Parliament.

When the plaintiff states the objection in his answer, and claims the same benefit as if he had demurred, the case comes within the rule. (*Grubb* vs. *Perry*, 7 Jurist, 637 ; *Young* vs. *Macdonell*, 14 Simons, 34).

The defendant cannot on the argument under this rule take an objection as to parties, which he has not taken by the answer. (*Lovell* vs. *Andrew*, 11 Jurist, 835).

The answer is taken to be true for the purpose of the objection. (*Richardson* vs. *Larpent*, 2 Younge and Collyer, 507).

As to who has the right to begin on the argument of the objection, the cases differ. See *Bradstock* vs. *Whatley*, 6 Beaven, 451; *Attorney General* vs. *Gardner*, 2 Collyer, 564; *Lovelt* vs. *Andrew*, 11 Jurist, 835.

January, 1842. When the objection is not taken before the hearing, the Court has a discretionary power to make a decree without prejudice to the absent parties.

117. Decree saving rights of absent parties.

That, if a defendant shall at the hearing of a cause object that a suit is defective for want of parties not having by plea or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the Court (if it shall think fit) shall be at liberty to make a decree saving the rights of absent parties.

Such decrees rare.

It may be here observed that the Court seldom exercises this power, and more frequently adjourns cases to have parties added, although the objection has been taken neither by answer nor on the argument. It is always safe therefore to amend the record as soon as any defect for want of parties is apprehended.

The Order is copied from the English Order 40 of 1841.

The Court will be careful not to make the decree, if by it the absent party may be in any way prejudiced. (*Kimber* vs. *Emsworth*, 1 Hare, 293; *May* vs. *Selby*, 1 Younge and Collyer, 235; *Faulkner vs. Daniel*, 3 Hare, 199).

CHAPTER XIII.

Speeding the Cause.

Before stating the practice after the hearing of the cause, it is as well to give the rules, under which, if the plaintiff is dilatory, the defendant can force the cause to a hearing, or get the Bill dismissed. The following Orders of 1850 settle the practice on this point.

1850. LXIV. Bill may be dismissed.

Any defendant may upon notice move the Court that the bill may be dismissed with costs, for want of prosecution, and the Court may order accordingly.

If Plaintiff does not move in four weeks after answer.

1. If the plaintiff, having obtained no order to enlarge the time, does not obtain and serve an order for leave to amend the bill, or does not file the replication, or set down the cause to be heard on bill and answer, within four weeks after the answer, or the last of the answers has been filed, or after the filing of a traversing note : or—

Or amend fourteen days after order to amend.

2. If the plaintiff, having obtained no order to enlarge the time, does not amend the bill within fourteen days after the date of the order for leave to amend : or—

Or if the Plaintiff does not set down the cause in four weeks.

3. If the plaintiff, having obtained no order to enlarge the time, does not set down the cause to be heard, and obtain and serve a subpœna to hear judgment within four weeks after publication has passed.

1850. LXV. When there has been amendment.

Where the plaintiff has, after answer, amended his bill, any defendant may upon notice move to dismiss the bill with costs for want of prosecution, if the plaintiff, having obtained no order to enlarge the time, does not file the replication, or set down the cause to be heard on bill and answer within the times following, viz. :

Fourteen days after the service of subpœna to answer amended Bill. Or fourteen days after the Master's refusal to allow further time to answer.

1. Within fourteen days after service of a subpœna to answer the amended bill, in cases where the defendant does not desire to answer the amendments.
2. Within fourteen days after the Master's refusal to allow further time in cases where the defendant, desiring to answer, has not put in his answer within eight days after the service of the subpœna to answer the amended bill, and the Master has refused to allow further time.

Or fourteen days after answer to amended Bill, except where re-amended.

3. Within fourteen days after the filing of the answer in cases where the defendant has put in an answer to the amendment, unless the plaintiff has within such fourteen days obtained from the Court a special order for leave to re-amend the bill.

If the Bill is re-amended, the practice after the re-amendment will be the same as above laid down to be followed after amendment.

Optional with Defendant, to move to dismiss, or set down the cause to be heard.

The 66th Order of 1850, already given, allows the defendant the option of moving to dismiss the Bill, or setting it down to be heard. A cause may, under many circumstances, be of such a nature that it is more to the defendant's benefit to have it disposed of on argument, than put out of Court. Suits for account for instance, where the defendant expects a balance in his favour; or a bill by a vendee for specific performance, where the defendant may be desirous of having the purchase completed, which has been hitherto delayed for want of the production of the money by the Plaintiff; and numerous other cases which might be mentioned.

It is provided, however, that the dismissal of the bill for want of prosecution is a bar to a subsequent suit for the same matter, unless the Court otherwise order.

The following is the Order :—

1850. LXVII. Bill dismissed, bar to future suit for same matter.

If the plaintiff, after the cause is set down to be heard, causes the bill to be dismissed on his own application, or, if the cause is called on to be heard in Court, and the plaintiff makes default, and by reason thereof the bill is dismissed, then and in such case such dismissal is, unless the Court otherwise orders, to be equivalent to a dismissal on the merits, and may be set up in bar to another suit for the same matter.

It will be seen that the above Order does not apply

when the plaintiff dismisses his own Bill, but only to a dismissal after the cause is set down. The old practice still obtains, when the plaintiff dismisses his own Bill before the cause is set down. He may dismiss, before the defendant has appeared, without costs. (*Thompson* vs. *Thompson*, 7 Beaven 350). If after appearance, it must be on payment of costs, and, if a new Bill is filed for the same cause before such costs are paid, the Court will stay proceedings in the new suit, until they are paid. But on payment of such costs the plaintiff can (having dismissed his Bill before the cause is set down) file a new one for the same cause of suit without obtaining the leave of the Court. It is submitted, that it would have been better to carry the provision of the above 67th Order further, and to have prevented the plaintiff filing a new Bill, for the same cause, without leave of the Court, if he dismissed after appearance. Such a provision could work no hardship, because on a proper case made the Court could always order the dismissal without prejudice to a new suit. The benefit would be, that the defendant would be enabled to know, whether or not he was subject to be again made a defendant for the same cause of action.

If cause not set down, Plaintiff may always dismiss without prejudice to filing a new bill.

Rule as to costs.

Question of the propriety of this indulgence to the Plaintiff.

The above Orders 64, 65, 66 and 67, are precisely like the English Orders 114, 115, 116 and 117, of 1845, with the following exceptions. In the first article of the English Order 114, which answers to the above Order 64, the words are "after the answer, or the last of the answers is found *or deemed to be sufficient*." This is varied in the above Order, because now, under the Order 30, of 1850, any answer is sufficient, exceptions for insufficient being by that Order abolished. Again in the Order 114 there is an article as follows, "If the Plaintiff, having undertaken to reply to a *plea* to the whole Bill, does not file his replication within four weeks after the date of his undertaking", &c. This is omitted in the Orders of 1850, because, by Order 25 of 1850 pleas are abolished. In the commencement of the English Order 115, which answers to the above

Orders 64, 65, 66, and 67, compared with English Orders 114, 115, 116, and 117.

Order 65, are the words, "*Without requiring an answer to the amendments*", which are omitted in the above Order, because it is here optional with the defendant to answer or not, the process of contempt to compel an answer being under the 30th Order, of 1850, abolished, and the plaintiff has his remedy by the traversing note under the 23rd Order of 1850, or by proceeding to get the cause set down to be heard *pro confesso*, under the 33rd and following Orders of 1850.

In the English Order 116, which answers to the above Order 66 of 1850, the subpœna is directed to be served on the "*Plaintiff*". The above 66th Order requires its service on all parties to the cause, and such is the general practice in England, for it would be unreasonable to expect another defendant to be prepared for the argument of the cause without any notice.

Meaning of Article One, Order 64.

The above Orders then substantially assimilate the practice to the English practice under the Orders of 1845, upon which there have been some decisions. The words "*last of the answers*," in the first article of the English Order 114 (above Order 64), mean, the last of the answers of that defendant who is moving to dismiss. They might be supposed to mean the last answer filed by any defendant. (*Dalton* vs. *Hayter*, 7 Beaven, 586; *Sprye* vs. *Reynell*, 10 Beaven, 351.)

Any Defendant may move to dismiss, one month after his own answer in.

So it would appear, that after one month after the answer of any defendant (for, there being now no exceptions to the answer, each defendant will only file one, except a supplemental answer on leave of the Court), that defendant may move to dismiss, whether the other defendants have answered or not; or, if they have answered, no matter how recently. The Court can, however, give such time to reply, or to amend, as on the argument of the motion the Plaintiff may seem justly entitled to. It is not meant, that, as soon as the time arrives for the motion to dismiss, the defendant may insist on the Order, under any circumstances. And see Order 68 of 1850. The object of allowing the motion, is to enable the defendant to get the cause

speeded, or to get the bill dismissed, as the circumstances may seem to justify. The Plaintiff can, in most cases, only obtain time on payment of costs.

Reasonable construction of the Order.

It is only the reasonable construction of the Orders to hold, that the defendant may move to dismiss one month after his own answer; and the reason for such construction is stronger here than in England; for, it being no longer in the plaintiff's power to compel an answer, but other means of proceeding being open to him to proceed with the cause, it would be unfair, were it in his power to reply conclusively to the motion of one defendant to dismiss, that another defendant has not yet answered, or has not answered a month ago.

Question of Order to amend being an answer to a motion to dismiss.

An Order to amend, obtained after notice to dismiss is given, has been in England held to be, without any special circumstances against it, a sufficient answer to the motion. But after such notice no Order to amend can be obtained in England, *as of course*, under an Order of April 1847, which has not been adopted here. Under the 12th Order of 1850, an Order of course to amend can be obtained, if no Order of course to amend has already been taken, at any time within a month after the "*last of several answers*" has been filed, here meaning, the last of any answer of any defendant,(see *Arnold* vs. *Arnold*, 1 Phillips 805; decided before the Order of April 1847 was published). Then supposing a defendant A. to answer, and a month elapse, it seems he might give a notice of motion to dismiss, although B. has not answered. After the notice B. might answer, and the plaintiff might immediately take an Order to amend; but that would not necessarily form a conclusive answer to the motion, but the Court would probably grant time. The same might be the case, when B. had answered, but a month had not elapsed before the motion of A., and the plaintiff took his Order to amend. We have said such an Order would not form a conclusive answer to the motion; but it would no doubt have an effect upon the Order which the Court would make. The defendant would seem to have been

regular in giving his notice, and yet it might appear that the plaintiff was taking a step to get on with the the suit, and that he was entitled to the Order to amend, which he had taken. The Court would not, therefore, dismiss the Bill, but would put the plaintiff on such terms as the case might warrant. In England the Order to amend in such a case being only obtainable on motion, under the Order of 1847, it being once obtained on such motion, after notice, it is much more reasonable to hold it to be an answer to the motion to dismiss; for the defendant must have become aware that the Court thought it a proper case for permitting the plaintiff to proceed by amendment. If the Order to amend is out, before the notice to dismiss is given, the case comes of course under the above 65th Order. The English decisions as to the Order to amend, being an answer to the motion to dismiss, are, *Lester* vs. *Archdale*, 9 Beaven, 156; *Findlay* vs. *Lawrence*, 11 Jurist, 705; *Raistrick* vs. *Elsworth*, 12 Jurist, 281.

English decisions.

Discretion of the Court when there is delay.

It will be readily seen, that, if the Court were bound by any positive rules to refuse the motion to dismiss, on the ground of any proceedings taken on the part of the plaintiff, notwithstanding any delay he may have already been guilty of, injustice would be done. After long delay the plaintiff might take a proceeding merely to stop the motion, and again follow the same course when another motion was likely to be made. The Court will therefore put him on terms to speed the cause; and all doubt is removed on this head by the 68th New Order, which is as follows:—

1850. LXVIII. Motion to dismiss, when delay takes place.

In every other case, where the plaintiff is unreasonably delaying the suit, any defendant may move to dismiss the bill for want of prosecution, after the expiration of four weeks from the time of his filing his answer, if the plaintiff, having obtained an order to enlarge the time, does not obtain and serve an order for leave to amend the bill, or does not file the replication, or set down the case to be heard on bill and answer, within that period; and upon the hearing of such motion, the Court may make such order for the dismissal of the bill, or for expediting the suit, and as

Discretionary Order.

to costs, as under the circumstances of the case shall seem just.

This Order establishes a practice not in force in England. For here, it would seem, under the terms of the above Order, there may be a motion to dismiss, *at any stage of the cause*, if four weeks have elapsed after answer, if the plaintiff "is unreasonably delaying the suit." The words are "*in every other case*"—that is, in every case not provided for by the former Orders. It had been held in England, that a defendant could not move to dismiss during the pendency of a demurrer. Of course he cannot here, if it be his own demurrer, for he might set it down himself, but he is not prevented if the demurrer of another defendant is "unreasonably" delayed. It has been also held in England, that, pending a reference as to title, in a specific performance case, or after a decree or decretal order, there could be no motion to dismiss. (*Collins* vs. *Greaves*, 5 Hare, 596; *Bluck* vs. *Colnaghi*, 9 Simons, 411). But the above 68th Order seems to admit of a motion here, whether after or before any reference or decree, if the Plaintiff's delay is "unreasonable," and that the Court has power to decide on the question of the delay being reasonable or "unreasonable." And the Court would also consider, whether the cause is proper to be dismissed, or whether an Order to speed would not be more in furtherance of the ends of justice.

Semble motion may be made at any stage of the cause.

CHAPTER XIV.

Proceedings to hear Cause "Pro Confesso."

Pro confesso.

Another mode of proceeding, when the defendant elects not to answer, is to procure the cause to be set down to be heard as if the defendant had confessed the truth of the matter in the Bill stated. This is done under the provisions of the following Orders :—

1850.
XXXIII. After time for answering, Plaintiff may give notice of motion to take bill *pro confesso.*

At the expiration of the time allowed to any defendant within the jurisdiction of the Court for answering the bill or at any time within three weeks afterwards, the plaintiff may cause such defendant to be served, personally, or by his solicitor (if he have one), with a notice of motion, to be made on some day not less than three weeks after the day of such service, that the bill may be taken *pro confesso* against such defendant; and thereupon, unless such defendant shall in the mean time have put in his answer to the bill, or obtained further time to answer the same, the Court, if it shall think fit, may order the bill to be taken *pro confesso* against such defendant, either immediately, or at such time and upon such terms and subject to such conditions as under the circumstances of the case the Court shall think proper.

XXXIV. When Defendant cannot be served, may by a notice published in the *Gazette.*

Where a defendant shall not put in his answer in due time, after appearance entered by or for him, and he shall have no solicitor, and such defendant has either been served with subpœna out of the jurisdiction, or the plaintiff has been unable with due diligence to serve him personally with such notice of motion as is provided by Order XXXIII., by reason of his being concealed, or for any other cause, the plaintiff may cause to be inserted in the *Canada Gazette* a notice, that on a day to be named

therein, not less than four weeks after the first insertion of such notice in the *Gazette*, the Court will be moved that the bill may be taken *pro confesso* against such defendant, which notice must be inserted at least once in every week from the time of the first insertion thereof up to the time for which the same shall have been given; and the plaintiff must, upon the hearing of such motion, satisfy the Court, either that such defendant has been served with subpœna out of the jurisdiction, or that the plaintiff has been unable with due diligence to serve such defendant personally with such notice of motion as aforesaid, by reason of his being concealed, or for some other cause, and in either case that he has no solicitor, and that such notice of motion as aforesaid has been inserted in the *Gazette* as herein provided. And the Court, being satisfied thereof, and no answer having been filed, may order the bill to be taken *pro confesso* against such defendant, either immediately or at such time and upon such further notice as under the circumstances of the case may be deemed proper.

XXXV. Cause not heard on same day as order made.

No cause in which an order is made, that a bill be taken *pro confesso* against a defendant, is to be heard on the same day on which the order is made; but the cause is to be set down to be heard; and the Court, if it so think fit, may appoint a special day for the hearing thereof.

XXXVI. Defendant may appear at hearing.

A defendant, against whom an order to take a bill *pro confesso* is made, is at liberty to appear at the hearing of the cause, and, if he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits as stated in the bill.

XXXVII. If Defendant has appeared, the decree is absolute

Upon the hearing of a case, in which a bill has been ordered to be taken *pro confesso*, such decree is to be made as to the Court seems just; and in the case of any defendant, who has appeared at the hearing and waived all objection to such order to take the bill *pro confesso*, or against whom the order has been made after appearance, by himself or his own solicitor, or upon notice served upon him or his solicitor, thedecree is to be absolute.

XXXVIII. Court may make special Orders on such decree.

In pronouncing the decree the Court may, either upon the case stated in the bill, or upon that case and a petition presented by the plaintiff for the purpose, as the case may require, order a receiver of the real and personal estate of the defendant, against whom the bill has been ordered to be taken *pro confesso*, to be appointed with the usual directions, or direct a sequestration of such real and personal estate to be issued, and may (if it appears to be just) direct payment to be made out of such real and personal estate of such sum or sums of money as, at the hearing

of any subsequent stage of the cause, the plaintiff seems to be entitled to; provided that, unless the decree be absolute, such payment is not to be directed without security being given by the plaintiff for restitution, if the Court afterward think fit to order restitution to be made.

Security.

XXXIX. A decree, founded on a bill taken *pro confesso*, is to be passed and entered as other decrees.

Decree entered as other decrees.

XL. After a decree, founded on a bill taken *pro confesso*, has been passed and entered, if the decree be not absolute, under Order XXXVII., an office copy thereof may be served on the defendant, against whom the order to take the bill *pro confesso* was made, or his solicitor, together with a notice to the effect that, if such defendant desires permission to answer the plaintiff's bill and set aside the decree, application for that purpose must be made to the Court within the time specified in such notice, or that such defendant will be absolutely excluded from making any such application. If such notice as aforesaid is to be served within the jurisdiction of the Court, the time therein specified for such application to be made by the defendant is to be three weeks after service of such notice; but, if such notice is to be served out of the jurisdiction of the Court, such time is to be specially appointed by the Court on the *ex parte* application of the plaintiff.

If decree not absolute under 37th Order.

Notice of decree may be served, to give plaintiff opportunity to answer, or that he be excluded.

XLI. Any defendant, waiving all objection to the order to take the bill *pro confesso*, and submitting to pay such costs as the Court may direct, may have the cause reheard upon the merits stated in the bill, the petition for rehearing being signed by counsel as other petitions for rehearing.

Defendant submitting to costs may have rehearing.

In cases where a decree is not absolute under order XXXVII., the Court may order the same to made absolute on the motion of the plaintiff:

Times within which defendant may prevent decree being absolute.

1. After the expiration of three weeks from the service of a copy of the decree on a defendant, where the decree has been served within the jurisdiction.
2. After the expiration of the time limited by the notice provided for by order XL., where decree has been served without the jurisdiction.
3. After the expiration of *two* years from the date of the decree, where a defendant has not been served with a copy thereof.

Two years. In English Order, *three* years.

And such order may be made either on the first hearing of such motion, or on the expiration of any further time which the Court may on the hearing of such motion allow to the defendant for presenting a petition for leave to answer the bill.

XLIII. *Where a decree is pronounced upon an order to take the bill pro confesso, and the party, in respect to whom*

such decree has been made, does not come in under some of the provisions in these orders contained, all future proceedings as to such defendant may be ex parte, unless where notice is by these orders specially provided or shall be directed by the Court. But, where the decree is not absolute under Order XXXVIII., and has not been made absolute under Order XLII., and a defendant has a case upon the merits not appearing in the bill, he may apply to the Court by petition, stating such case and submitting to such terms with respect to costs and otherwise as the Court may think reasonable, for leave to answer the bill; and the Court, being satisfied that such case is proper to be submitted to the judgment of the Court, may, if it thinks fit, and upon such terms as seem just, vacate the enrolment (if any) of the decree, and permit such defendant to answer the bill; and, if permission be given to such defendant to answer the bill, leave may be given to file a separate replication to such answer, and issue may be joined and witnesses examined, and such proceedings had as if the decree had not been made, and no proceeding against such defendant had been had in the cause.

When decree not yet made absolute, how defendant may obtain a hearing.

XLIV. The rights and liabilities of any plaintiff or defendant under a decree made upon a bill taken *pro confesso* extend to the representatives of any deceased plaintiff or defendant, and to any person or persons claiming under any person who was plaintiff or defendant at the time when the decree was pronounced; and with reference to the altered state of parties and any new interests acquired, the Court may, upon motion served in such manner, and supported by such evidence as under the circumstances of the case the Court deems sufficient, permit any party, or the representatives of any party, to adopt such proceedings as the nature and circumstances of the case require, for the purpose of having the decree (if absolute) duly executed, or for the purpose of having the matter of the decree and the right of the parties duly ascertained and determined.

How decree *pro confesso*, affects representatives.

The above Orders from 35 to 44 inclusive are copied mutatis mutandis from the English Orders of 1845, from 81 to 92 inclusive, excepting the 88th English Order which is not adopted, and excepting that the part above italicised in the 42nd Order is not in the English Orders. And instead of the time, two years, provided in the 3rd Article of the 41st Order, the English Order gives three years. The English 88th Order of 1845, which is not

English Orders on the subject. 1845. 88. here adopted, is as follows: "No proceeding is to be taken, and no receiver appointed, under the decree, nor any sequestrator, under any sequestration issued in pursuance thereof, is to take possession of, or in any manner intermeddle with, any part of the real or personal estate of a defendant, and no other process is to issue to compel performance of the decree without leave of the Court, which is to be obtained on motion with notice served on such defendant or his solicitor, unless the Court dispenses with such service."

The cause of its omission probably is, that the other Orders seem to effect the same object sufficiently; for there seem to be no means of getting on with such proceedings without motion, and leave of the Court, unless the Court so decree under the above Order 38.

The English Orders to which the above 33rd and 34th Orders answer, but without closely following them, are as follows. It will be at once seen that the parts not adopted, are such as would be inconsistent with the other Orders of this Court.

English Orders. 1845. 76. "Upon the execution of an attachment for want of answer against any defendant, or at any time within three weeks afterwards, the Plaintiff may cause such defendant to be served with a notice of motion to be made on some day not less than three weeks after the day of such service, that the Bill may be taken *pro confesso* against such defendant; and thereupon unless such defendant has, in the meantime, put in his answer to the bill, or obtained further time to answer the same, the Court, if it so thinks fit, may order the bill to be taken *pro confesso* against such defendant, either immediately, or at such time and upon such terms and subject to such conditions, as under the circumstances of the case the Court thinks proper."

77. "In cases where any defendant, either being or not being within the jurisdiction of the Court, does not put in his answer in due time after appearance entered by or for him, and the plaintiff is unable, with due diligence, to procure a writ of attachment or any subsequent process for

want of answer to be executed against such defendant by reason of his being out of the jurisdiction of the Court, or being concealed, or for any other cause, then such defendant is, for the purpose of enabling the plaintiff to obtain an Order to take the bill *pro confesso*, to be deemed to have absconded to avoid, or to have refused to obey, the process of the Court. 1845. English Order. 77.

In cases where any defendant, who under Order 77 (*supra*) may be deemed to have absconded to avoid, or to have refused to obey, the process of the Court, has appeared in person or by his own solicitor, the plaintiff may serve upon such defendant or his solicitor a notice that on a day in such notice named (being not less than fourteen days after the service of such notice) the Court will be moved that the bill may be taken *pro confesso* against such defendant; and the plaintiff is, upon the hearing of such motion, to satisfy the Court that such defendant ought under the provisions of Order 77 to be deemed to have absconded to avoid, or to have refused to obey, the process of the Court; and the Court being so satisfied, and the answer not being filed, may, if it so thinks fit, order the bill to be taken *pro confesso* against such defendant, either immediately or at such time or upon such further notice as, under the circumstances of the case, the Court may think proper. 78.

In cases where any defendant, who under Order 77 (*supra*) may be deemed to have absconded to avoid, or to have refused to obey, the process of the Court, has had an appearance entered for him under Orders 29, 31, or 33, and has not afterwards appeared in person or by his own solicitor, the plaintiff may cause to be inserted in the *London Gazette* a notice, that on a day in such notice named (being not less than four weeks after the first insertion of such notice in the *London Gazette*), the Court will be moved that the bill may be taken *pro confesso* against such defendant; and the plaintiff is, upon the hearing of such motion, to satisfy the Court that such defendant ought, under the provisions of Order 77 (*supra*) to be 79.

deemed to have absconded to avoid, or to have refused to obey, the process of the Court, and that such notice of motion has been inserted in the *London Gazette* at least once in every week from the time of the first insertion thereof up to the time for which the said notice is given; and the Court being so satisfied, and the answer uot having been filed, may, if it so thinks fit, order the bill to be taken *pro confesso* against such defendant either immediately, or at such time or upon such further notice as under the circumstances of the case the Court may think proper."

The practice is plainly enough laid down by the above Orders, and few doubtful cases can arise under them so as to call for decisions. Several cases have occurred in England in reference to the state of the cause with regard to the attachment; but, that being abolished, those cases are of no importance to us. There are some points, however, on which precedents may be useful. Under the 78th and 79th English Orders of 1845, which answer in many respects to the above 34th Order, the Court, when the evidence of the defendant's absconding was not quite satisfactory, refused to make an order to set down the cause *pro confesso*, but gave a day to show cause. (*Courage* vs. *Wardell*, 9 Jurist, 1055).

English authorities on the subject.

An Order to amend is an abandonment of the Order to take the bill *pro confesso*. (*Weightman* vs. *Powell*, 12 Jurist, 958).

A cause being set down *pro confesso* against an absconding defendant was struck out of the paper on account of Counsel's absence, and, on application of the Plaintiff alone, it was placed in the paper again. (*Harvey* vs. *Renon*, 12 Jurist, 445). But it is apprehended that such ex-parte application would not be treated in the same manner, if the defendants had appeared by Counsel under the above 36th Order.

Under the English Order 84, of 1845, answering to the above Order 38, the bond of the plaintiff himself may be held sufficient security, under the authority of *Lett* vs.

Randall, 7 Jurist, 1075 ; where the plaintiff's own bond was held sufficient, under a provision of 1 W. 4.. ch. 36, similar to the provision of the above mentioned Orders. Still the Court has power, no doubt, to require further security, and, although this may seem hard on a plaintiff without means, a similar rule is enforced in the Queen's Bench under the absconding debtor's Act ; and it often happens there that a plaintiff is stopped for want of the security. In that case, however, the security is expressly named in the statute. The point will remain uncertain until a case arises, on which it can be seen whether the authority of *Lett* vs. *Randall* will be followed.

Under the 76th English Order of 1845, answering to the above Order 33, there are the following decisions. There being husband and wife defendants, and no Order for the wife to answer separately, the Order *pro confesso* should be against both (*Alexander* vs. *Osborne*, 16 Law Journal, new series, 368 ; 11 Jurist 444). A notice of motion having been given, and defendant having answered, pending the notice, the plaintiff may have the costs of the motion. (*Spooner* vs. *Payne*. 12 Jurist, 642).

CHAPTER XV.

Injunctions.

Common Injunctions to stay legal proceedings.

The frequent object of bills in Equity is to stay proceedings at law against the plaintiff in Equity, where the rule of law prevents a defence in that Court, but relief may be obtainable in Equity. The "Common Injunction" stays execution at law, but, generally, does not stay the proceedings down to judgment. As to the difference between common and special injunctions, see *Daniel's Chancery Practice*, vol. 3.

The following are the new rules on the subject of common injunctions :—

1850.
LXXI.
Injunction as of course for want of appearance ; or answer.

The plaintiff in a bill praying an injunction to stay proceedings at law is entitled, as of course, on motion or petition, and without an attachment, to the common injunction for want of appearance, if a defendant has not appeared in person, or by his own solicitor, on or after the expiration of *fourteen* days from the service of the subpœna ; and for want of answer, if a defendant is in default for want of answer, on or after the expiration of *fourteen* days from the day on which an appearance was entered by or for him.

LXXII.
Amendment.
Effect of.

The plaintiff in an injunction cause, having obtained the common injunction to stay proceedings at law, may (either before or after the answer of a defendant is put in, and whether such injunction be or be not continued to the hearing of the cause) obtain one order as of course to amend his bill without prejudice to the injunction ; and, if such bill be amended pursuant to such order, such defendant may thereupon (and although he may not have put in his answer to such bill or the amendments thereof) move the Court on notice to dissolve the injunction, on the

ground that such bill as amended does not, even if the amendment be true, entitle the plaintiff thereto.

LXXIII. Affidavit to support or contradict the answer.

On all motions to obtain or dissolve a special injunction, as well as to dissolve or extend the common injunction, affidavits may be used either to support or contradict the answer.

LXXIV. Amendment when Injunction not granted.

In case an injunction to stay proceedings at law be prayed by the bill, and shall either not be allowed, or, having been obtained, shall have been dissolved upon the merits stated in the answer, and the plaintiff shall afterwards amend his bill, and the defendant shall not answer, or demur to the amended bill, within eight days after service of the subpœna to answer, the plaintiff shall be entitled to move for an injunction upon affidavit of the truth of the amendments.

The above Orders 71 and 72 are copies verbatim from the 59th and 60th English Orders, of 1845, with the exception, that eight days are named in the English Order instead of fourteen as in the above 31st Order.

The above 74th Order is copied from the 36th Article of the 16th English Order of 1845.

If within fourteen days from appearance the defendant demurs, or answers and demurs, the plaintiff, it seems, is not entitled to the Common Injunction under the 71st Order. See *Cousins* vs. *Smith*, 13 Vesey 164.

The 73rd Order is not from any English Order. The necessity for it arises from the new practice of permitting answers to be short, and not compelling a full discovery as formerly.

CHAPTER XVI.

Summary Decrees and Decretal Orders.

The Orders of 1845 have effected an entire change in the practice in suits merely for account, and in suits for the foreclosure and redemption of mortgages.

1850. LXXVI. Short Bill, in suits for account,

In suits for an account it shall not be necessary or proper to state in the pleadings any mere matter of charge or discharge; neglect or misconduct in the accounting party may be insisted on in the Master's office, though not stated in the pleadings. Provided always, that nothing herein shall be construed to exempt the plaintiff from the necessity of showing upon his bill that the defendant is an accounting party, or from stating all such facts as may be necessary to enable the Court to determine the rights of all parties, and to adjudicate upon the whole case. Provided, also, that this order shall apply, whether the suit is for an account merely, or for an account and other purposes; but, in the latter case, it shall apply only so far as the suit is one for an account, and this order shall not interfere with the rules of pleading further or otherwise than is expressly provided.

and partly for other purposes.

In suits for account, and foreclosure and redemption suits, a decree for reference, on motion,

In suits for an account, or where an account is necessary before the Court can proceed to the ultimate decision of the case, and where the state of such account only, and not the accountability of the defendant, is the matter in question; and in suits for the redemption and foreclosure of mortgages, where the state of the account, or the state of the account and the priority of the incumbrances form the only subject for enquiry, the plaintiff may apply to the Court, at any time after bill filed, but not earlier than fourteen days after service of the subpœna to appear upon the defendant, or upon the last of several defendants, by motion (of which notice may be served, together with

the subpœna to appear, when that is practicable) that the matter may be forthwith referred, and the account proceeded with in the Master's office. And thereupon the Court may in its discretion, if satisfied that the case comes within the provisions of this order, pronounce such a decree as would have been made, had the cause proceeded to a hearing in the ordinary way ; and the decree so pronounced may be either with or without a reservation of further directions and costs according to the nature and circumstances of the case. And the decree so pronounced shall be as effectual to all intents and purposes as it would have been, had the cause been brought to a hearing in the usual way ; and the reference thereby ordered shall be proceeded with in the same manner provided with respect to ordinary references by orders (79, 80, 81, 82) ; and in proceeding with such reference the Master shall have all the power and authority which he would have had and exercised had the matter been referred to him by a decree pronounced according to the ordinary practice of the Court ; and upon the signing of any report, made upon such reference, the case may be set down to be heard upon further directions, or otherwise ; and all proper decrees and orders may be made in the same manner, and to the same extent, as fully and effectually to all intents and purposes as if the suit had proceeded according to the established practice. The pendency of any such motion, as aforesaid, shall not stay the progress of the cause, unless ordered by the Court.

LXXVIII. Time for payment of mortgage money.

In suits for the redemption or foreclosure of mortgages, the time allowed for the payment of the mortgage money shall in future be six months from the date of the Master's report ; and, where there are several incumbrances, three months only shall in future be allowed to each successive incumbrancer after the first. The time so fixed shall not be further enlarged.

CHAPTER XVII.

Discovery.

Practice in Bills for discovery, the same as formerly.

There is one description of Bill in Equity, with respect to which the practice remains as it was before the new Orders; namely the Bill for discovery in aid of an action at law. Bills generally were for discovery and relief, and the discovery was enforced under the interrogatories which formed part of the Bill. The same object, where relief is sought in Equity, is now obtained by examining the defendant. But, where no relief is sought in the Court, but only a discovery of facts is required in order to aid the plaintiff in prosecuting an action at law, the practice must be as formerly. The Bill will be framed with interrogatories, and, unless the defendant demurs successfully to the Bill, it is apprehended, that, notwithstanding the foregoing rules, an answer would be enforced by attachment, and exceptions might be entertained for insufficiency. In a suit for discovery, the answer being in, the suit proceeds no further, and the general practice is that the plaintiff pays the costs.

The above remarks as to Attachment and Exceptions would seem to be contradictory to the express words of the rules; but it has been ascertained that the Bill for Discovery is to be in the old form, and, if so, then to hold that a *sufficient* answer cannot be *enforced*, would be to permit any defendant to such a Bill to set it at defiance and render it useless.

This branch of the jurisdiction will require some further Orders to render the practice clear and certain.

The new rule on the subject is the following :—

1850. XLIX. Bill of Discovery.

No Bill for discovery merely shall henceforward be filed, except in aid of the prosecution, or defence, of an action at law.

"The Bill is commonly used in aid of the jurisdiction of some Court of Law, to enable the party who prosecutes, or defends an action at law, to obtain a discovery of the facts, which are material to the prosecution or defence thereof." *Story's Equity Pleadings, sec.* 311.

"In general it seems necessary, in order to maintain a Bill of Discovery, that an action should be already commenced in another Court, to which it should be auxiliary. There are exceptions to this rule, as where the object of discovery is to ascertain who is the proper party, against whom the suit should be brought. But these are of rare occurrence." *Story's Equity Jurisprudence, v.* 2, *sec.* 1483.